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CASE NO. 97-__

IN THE UNITED STATES SUPREME COURT

October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

DOUGLAS MARTIN ESCOBAR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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56pp

QUESTIONS PRESENTED

I

Whether the Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted," and that such statements can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless they do not mention the defendant at all?

II

Whether the Florida Supreme Court's harmless error analysis is flawed for failing to consider the defendant's corroborating confession on appeal, contrary to Idaho v. Wright, 497 U.S. 805 (1990), and Cruz v. New York, 481 U.S. 186 (1987)?

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CASE NO. 97-__
IN THE UNITED STATES SUPREME COURT
October Term 1997

THE STATE OF FLORIDA,
Petitioner,

vs.

DOUGLAS MARTIN ESCOBAR,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Escobar v. State, 699 So. 2d 988 (Fla. 1997).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, case number 77,736, as well as the court's order denying rehearing.

JURISDICTION

The judgment under review was entered on July 10, 1997. Rehearing was denied on October 2, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3). The Court has granted Petitioner's motion to extend the filing date for this petition until January 16, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

Respondent and his brother, Dennis Escobar, were convicted of first-degree premeditated murder, possession of a firearm during the commission of the felony, and grand theft of an automobile. Escobar v. State, 699 So. 2d 988, 991 (Fla. 1997). The Florida Supreme Court recited the following facts in the opinion under review:

> Through a combination of the brothers' confessions, testimony from Dennis Escobar's wife, testimony from a friend, and physical evidence, the following facts were presented to the jury. During a day-long drinking binge on March 30, 1988, the Escobar brothers were traveling in a gray Mazda they had stolen a few days earlier from a Miami car dealer. Douglas was driving and Dennis was a passenger when the brothers saw a police car following them. Douglas tried to evade the officer by pulling into a residential yard. The police car stopped behind them. Douglas said to Dennis, "If he gets out, shoot him." The officer, Victor Estefan, exited his car with his gun drawn and shouted for the brothers to exit their car. As Estefan approached, Dennis got out, fired three or four shots at Estefan with a .357 magnum handgun, and returned to the Mazda. Douglas backed the

Mazda into Estefan's patrol car before driving off. The brothers had the Mazda washed to eliminate fingerprints, abandoned the car, and threw the gun into a canal. Police recovered the stolen car and found physical evidence indicating that the car had hit Estefan's patrol car. A fingerprint from Douglas was found on the stolen Mazda.

There were no eyewitnesses or suspects the night of the shooting. Just before he died of gunshot wounds, Estefan described his assailant as a white male passenger in a gray Mazda, which Estefan had stopped because it was traveling without lights. A month later, Miami police received information from California police implicating the Escobar brothers in the Estefan shooting. Two Miami police detectives traveled to California to meet with Dennis and Douglas Escobar, who were in custody in a California medical facility where they were recovering from wounds received in a shoot-out with California Highway Patrol officer. [note 1] The Escobars individually confessed to participating in the murder of Estefan in Miami.

[note 1] Douglas and Dennis Escobar were tried and convicted in April 1989 of attempted first-degree murder for shooting a California Highway Patrol trooper who had stopped the Escobars for an alleged traffic violation in April 1988. Both Dennis and Douglas Escobar were sentenced to life in prison in California.

Id.

Prior to trial, Respondent and his co-defendant moved to sever their trials. Originally the trial court allowed separate trials. However, the trial court then granted the State's motion for rejoinder based upon revisions in the Florida evidence code in 1990. The brothers were tried jointly. Id. Neither brother testified at the joint trial. The jury found Respondent guilty of all charges and, by a vote of eleven to one, recommended the death penalty. Id. The trial court followed the recommendation, finding two aggravating factors: (1) previous conviction of a violent felony, and (2) the victim was a law enforcement officer engaged in the lawful performance of official duties. The trial court found one nonstatutory mitigating factor: Respondent came from a broken home. The trial court sentenced Respondent to death. Id.

Respondent raised the issue of the admissibility of his brother, codefendant Dennis's statement, on appeal, asserting that the admission violated Bruton v. United States, 391 U.S. 123 (1968). The State responded that the admission was proper under the Confrontation Clause, and if not, harmless. The Florida Supreme Court ruled that the trial court erred in admitting the statements and that the error was not harmless, "[f]or the reasons stated in our opinion in Franqui[v. State, 699 So. 2d 1312 (Fla. 1997)('Franqui I')]." Escobar, 699 So. 2d at 9992. In Franqui I, the Florida Supreme Court held that, A) a co-defendant's declaration against penal interest is not a firmly rooted exception to the hearsay rule and its admission thus violates the Confrontation Clause unless the circumstances surrounding the statement demonstrate particularized guarantees of trustworthiness; but that, B) the only such circumstance to be considered is a codefendant's "individually self-incriminating" statement which is devoid of any mention of the defendant or the defendant's actions. Franqui I, 699 So. 2d at 1318-20.

The State has also sought review in Franqui I, because, in reliance on it, the Florida Supreme Court has reversed not only this case, but Franqui's death sentence in Franqui v. State, 699 So. 2d 1332 (Fla. 1997)("Franqui II"), Franqui's Franqui II-codefendant's death sentence in Gonzalez v. State, 700 So. 2d 1217 (Fla. Sept. 18, 1997), and the convictions and sentences of death in Dennis Escobar v. State, 699 So. 2d 984 (Fla. 1997).[1] In San Martin v. State, 1997 WL 792796 (Fla. Dec. 24, 1997), the companion case to Franqui I, the court held that Bruton error occurred, but was harmless. San Martin v. State, No. 84,702, in which San Martin has also raised the Bruton issue in challenging his conviction and sentence for the Bauer murder, remains pending in the Florida Supreme Court.

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[1] Apart from the Florida Supreme Court having based its reversal on Franqui I, the Escobar brothers' cases are wholly unrelated to that of Franqui or his codefendants.

REASONS FOR GRANTING THE WRIT

(I) THE COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS AGAINST PENAL INTEREST IS "FIRMLY ROOTED", AND AS TO WHETHER SUCH STATEMENTS, WHEN MADE BY A NONTESTIFYING CODEFENDANT, CAN EVER EXHIBIT SUFFICIENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS TO BE ADMITTED AGAINST THE DEFENDANT.

(II) THE FLORIDA SUPREME COURT'S HARMLESS ERROR ANALYSIS IS FLAWED FOR FAILING TO CONSIDER THE DEFENDANT'S CORROBORATING CONFESSION ON APPEAL, CONTRARY TO IDAHO V. WRIGHT AND CRUZ V. NEW YORK.

I.

THE COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER THE EXCEPTION TO THE HEARSAY RULE FOR STATEMENTS AGAINST PENAL INTEREST IS "FIRMLY ROOTED", AND AS TO WHETHER SUCH STATEMENTS, WHEN MADE BY A NONTESTIFYING CODEFENDANT, CAN EVER EXHIBIT SUFFICIENT PARTICULARIZED GUARANTEES OF TRUSTWORTHINESS TO BE ADMITTED AGAINST THE DEFENDANT.

A. The Florida Supreme Court erred in determining, contrary to the view of most federal and many state courts, that the admission of a nontestifying codefendant's statement violates the Confrontation Clause because the exception to the hearsay rule for statements against penal interest is not "firmly rooted."

In Ohio v. Roberts, 448 U.S. 56, 64-66 (1980), and again in Idaho v. Wright, 497 U.S. 805, 814-15 (1990), this Court set forth a two-prong test enunciating the circumstances under which the statement of a nontestifying witness may be admitted against a Defendant in a criminal trial. Under the first prong of the test, such a statement may be admitted without running afoul of the Confrontation Clause if it falls within a "firmly rooted" hearsay exception.[2] The question presented is whether the hearsay exception for statements against penal interest is firmly rooted so

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[2] The second prong, relating to statements not falling within a firmly-rooted exception, is addressed at Subpoint B, infra.

as to allow such statements to be directly admitted against the declarant's accomplice without violating the Confrontation Clause. This issue has not been addressed by the Court, see Williamson v. U.S., 512 U.S. 594, 114 S. Ct. 2431, 2437 (1994)(O'Connor, J.)("in particular we need not decide whether the hearsay exception for declarations against penal interest is "firmly rooted" for Confrontation Clause purposes"), and is a matter of dispute among the state and federal courts that have addressed it, causing aberrant results in an area where uniformity in the application of a legal principle is desirable, if not mandated.

As noted in the Statement of the Case and Facts, the Florida Supreme Court stated that its reasoning herein was that utilized in Franqui I. The Florida Supreme Court recognized the Roberts rule in Franqui I, 699 So. 2d at 1319, but concluded that statements against penal interest are not firmly rooted. The court reasoned that because such statements were specifically excluded by the Florida evidence code from 1977 until 1990, the exception could not be considered firmly-rooted.[3] Id. Both the Florida Supreme Court's reasoning and its conclusion are flawed.

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[3] Even this conclusion is suspect, however. Before the adoption of the evidence code, the court had recognized declarations against penal interest as an exception in Baker v. State, 336 So. 2d 364 (Fla. 1976). The exception was included when the new evidence code, which was modeled on the federal rules, was statutorily adopted. §90.804(2)(c), Fla. Stat. (1977). The court below was apparently referring to additional language in the Florida version of the rule that prohibited the use of such statements against criminal codefendants jointly tried. Id. Several courts, however, had concluded that the limiting language was merely intended to codify Bruton, and, as such, had held that it did not prohibit the admission of any statements admissible under Bruton and its progeny. See Charles W. Ehrhardt, Florida Evidence §804.4 (1996); Maugeri v. State, 460 So. 2d 975, 980 (Fla. 3d DCA 1984); Cipollina v. State, 501 So. 2d 2, 3 (Fla. 2d DCA 1986), rev. denied, 509 So. 2d 1119 (Fla. 1987). The limiting language was repealed in 1990. §90.804(2)(c), Fla. Stat. (1991).

The Florida Supreme Court has illogically concluded, based solely on the recent history of Florida's evidentiary provisions, rather than federal interpretation of the Confrontation Clause, that for the purposes of the federal Confrontation Clause, the exception for declarations against penal interest is not firmly-rooted. This question can only be determined by looking at the evidentiary practices of the nation as a whole, especially federal interpretations. Were the court's reasoning followed, a different meaning of the term "firmly-rooted" would ensue for every individual state, depending upon the dictates and history of that state's rules of evidence. The state court's analysis stands in stark contrast with this Court's approach in White v. Illinois, 502 U.S. 346, 355 n.8 (1992), where the Court, holding that the hearsay exceptions for spontaneous declarations and statements made for medical treatment were firmly rooted, looked to the historical evolution of those exceptions in 17th century English common law, and further observed that the evidence codes of almost four-fifths of the states currently recognized the exception, as did the Federal Rules of Evidence. Similarly, in Bourjaily v. United States, 483 U.S. 171, 182-84 (1990), the Court, in recognizing as firmly rooted the co-conspirator exception, looked, not to any single state's treatment of that exception, but to early federal case law. Thus, the Florida Supreme Court's narrow focus on Florida's treatment of declarations against penal interest was inappropriate in determining whether that exception is firmly rooted under the Confrontation Clause of the United States Constitution.

Had the court looked beyond the borders of Florida, it would have found that the overwhelming majority of federal appellate courts have determined that the exception is firmly rooted. See United States v. Trenkler, 61 F. 3d 45, 62 (1st Cir. 1995)(declaration against penal interest is firmly rooted exception); United States v. Katsougrakis, 715 F. 2d 769, 775 (2d Cir. 1983); Neumann v. Rivers, 125 F.3d 315, 319 (6th Cir.

1997); United States v. York, 933 F. 2d 1343, 1363 (7th Cir. 1991)("Our holding in Garcia was tantamount to saying that the exception is well-rooted within the meaning of Roberts and Bourjaily, and we affirm that view today"); Berrisford v. Wood, 826 F.2d 747, 751 (8th Cir. 1987);[4] Jennings v. Maynard, 946 F. 2d 1502, 1505 (10th Cir. 1991)[5]; United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991). The only federal appellate court to expressly come to a contrary conclusion is the Fifth Circuit, in United States v. Flores, 985 F. 2d 770 (5th Cir. 1993).

At least eight states have concluded that the exception is firmly rooted. State v. Jankiewicz, 831 S.W.2d 195, 198 (Mo. 1992); State v. Sego, 629 A.2d 1362, 1367 (N.J. Super. App. Div. 1993); State v. Tucker, 820 P. 2d 834, 838 (Or. App. 1991), rev. denied, 855 P.2d 150 (Or. 1993); Aylor v. State, 1997 WL 136479 (Tex. App. Mar. 26, 1997)(unpublished opinion); State v. Drawn, 791 P.2d 890, 894 (Utah 1990); Randolph v. Com., 482 S.E.2d 101, 105 (Va. 1997); State v. Denny, 471 N.W. 2d 606, 609 (Wis. App. 1991); State v. Dorcey, 298 N.W. 2d 213, 216 (Wis. App. 1980), aff'd, 307 N.W. 2d 612 (Wis. 1981).[6] A number of state appellate courts have, on the other hand, found the

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[4] The Eighth Circuit appears to draw a distinction between custodial and non-custodial statements against penal interest, concluding that while the latter fall within a "firmly rooted"exception, the former do not. See, e.g., Olson v. Green, 668 F.2d 421, 428 (8th Cir. 1982). The State submits this is not a valid distinction; see the discussion of Lee v. Illinois, infra.

[5] Jennings was reconstrued by the 10th Circuit in Earnest v. Dorsey, 87 F. 3d 1123, at n. 6 (10th Cir. 1996), where the Court stated that it was not addressing "whether, in general, the exception for statements against penal interest is firmly rooted."

[6] Dorcey was followed in State v. Thornton, 322 N.W.2d 699 (Wis. App. 1982), 1982 WL 172430, ***3 (unpublished opinion), but ignored in State v. Myren, 395 N.W.2d 818, 821 (Wis. App. 1986), in which the court concluded that Lee prevented it from considering the issue. In Denny, Myren was not mentioned, and the court held that the exception was firmly rooted.

exception not to be firmly rooted. Linton v. State, 880 P.2d 123, 129 (Alaska App. 1994); State v. Daniel, 817 P.2d 18, 20 (Ariz. 1991); People v. Fincham, 799 P.2d 419, 422 (Colo. App. 1990); State v. Kimble, 688 So. 2d 552, 565(La. App. 1996)(on rehearing); Chapman v. State, 628 A.2d 676 n.3 (Md. 1993); People v. Spinks, 522 N.W.2d 875, 878 (Mich. App. 1994); State v. Watts, 452 N.W.2d 728, 732 (Minn. App. 1990); State v. Hughes, 510 N.W.2d 33, 38 (Neb. 1993); State v. Abourezk, 359 N.W.2d 137, 141 (S.D. 1984)(on rehearing); State v. Whelchel, 801 P.2d 517, 952 (Wash. 1990); State v. Mason, 460 S.E.2d 36, 46 (W. Va. 1995).[7]

Some of the latter courts have relied on Lee v. Illinois, 476 U.S. 530 (1986), in concluding that the hearsay exception for statements against penal interest is not firmly-rooted.[8] These courts have misread Lee because that case did not squarely confront the issue, but merely "reject[ed] respondent's categorization of the hearsay involved in this case as a simple 'declaration against penal interest.'" 476 U.S. at 544 n.5. The Lee footnote should not be broadly read as concluding that a statement against penal interest is not firmly rooted, or that a statement falling under the exception cannot satisfy the Confrontation Clause. The Court's subsequent discussion of the statements in Lee makes it questionable whether the portions of the statements inculpating the defendant in Lee would have qualified as statements against penal interest. See Williamson,

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[7] New Hampshire appears to have concluded that the exception is not firmly rooted. See State v. Cook, 610 A.2d 800, 808 (N.H. 1992)(Thayer, J., specially concurring and objecting to the majority's failure to treat exception as firmly rooted).

[8] Lee has also caused at least one federal court to question its previous conclusion that the exception is firmly rooted. See Latine v. Mann, 25 F.3d 1162, 1166 (2d Cir. 1994)(questioning whether the court's previous conclusion in Katsougrakis, that the statement against penal interest exception was firmly rooted, survived Lee, but declining to address the issue).

discussed infra. The better reading of note 5,[9] particularly in light of Williamson's subsequent limitations on which statements qualify as being against penal interest is simply that the statements in question would not have qualified, obviating any studied consideration of the issue. See York, 933 F.2d at 1363 n.4 (so holding); Randolph, 482 S.E.2d at 105 n.3 (same); State v. Nielsen, 853 P.2d 256, 270 n.16 (Or. 1991)(same); also Drawn, 791 P.2d at 894 (citing Lee as a limitation on statements qualifying as against penal interest).[10]

Accepting that statements against penal interest qualify as firmly rooted, the question remains whether the statement at issue here qualifies.[11] The Court thoroughly discussed the limits of the exception in Williamson. In that case, the Court concluded that only the portions of the declarant's statement that are "truly self-inculpatory" fall within the exception. 114 S. Ct. at 2436. The Court further noted that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-

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[9] The language of note 5 does not make clear the precise argument that the state had advanced, i.e., whether it was even posited that the penal interest exception was firmly rooted.

[10] See also Cruz v. New York, 481 U.S. 186, 194 (1987), where the Court stated that no Bruton violation occurs where the codefendant's statement is "directly admissible against" the defendant. Presumably the determination of "direct admissibility" is made according to the Roberts formulation. Of note, both Lee and Cruz were squarely predicated on Bruton, wherein it was also explicitly pointed out that the Court was "intimat[ing] no view whatever" as to whether a statement admissible "under traditional rules of evidence" would run afoul of the Confrontation Clause. Bruton, 391 U.S. at 128 n.3. It should also be noted that Bruton involved a federal prosecution governed by the Federal Rules of Evidence, which at the time of the trial therein did not provide for a hearsay exception for declarations against penal interest.

[11] Florida's rule is identical to the federal rule. See Fed. R. Evid. 804(b)(3); §90.804(2)(c), Fla. Stat.

inculpatory, rather than merely attempts to shift blame or curry favor." 114 S. Ct. at 2436. Any portion of a statement inculpating the codefendant must be viewed in context, bearing in mind that even statements that on their face do not suggest guilt may be self-inculpatory where they expose the declarant to criminal liability. 114 S. Ct. at 2437.

Under these standards, the statement of Respondent's codefendant, Dennis, comes squarely within the exception. Dennis' statement described the events leading to, and the facts of, the shooting of the victim. His statement described a joint enterprise between him and his brother, the Respondent, without in any way minimizing his own conduct. Dennis admitted that he was the triggerman and that his motive for shooting the victim was to avoid going to prison.

While at the California medical facility, both the Respondent and Dennis made separate, interlocking custodial statements to the police describing the events leading up to and culminating in the death of the victim, Officer Estefan. On the day of the murder, they were both in possession of a stolen gun and were in a Mazda 626, which they had both stolen. Douglas was driving, when they noticed that a police car was following them. Douglas made a series of turns, in an effort to lose the police, before stopping the car. When the police appeared again, Douglas told Dennis to shoot the officer if he got out. Dennis exited the car and fired three or four shots at Officer Estefan. Subsequently, they disposed of the weapon in a body of water. Douglas was not familiar with the precise location, but Dennis was able to identify it. The car was subsequently abandoned in an apartment building parking lot. Both brothers stated that the motive was to avoid going back to prison.

As seen above, the mention of the Respondent in Dennis' confession is in the context of describing the joint enterprise

which is in its entirety self-inculpatory to Dennis. Even the assertion that Respondent told Dennis to shoot,[12] is in no way a minimization of Dennis' own role - instead this statement is genuinely self-inculpatory in that it establishes premeditation and prior knowledge on the part of Dennis that a shooting would ensue. Plainly, Dennis' statement was truly self-inculpatory and thus properly admissible against the Respondent as a statement against penal interest.[13]

Assuming the statements in question do qualify as statements against penal interest, and assuming that the penal-interest exception qualifies as firmly rooted, there is no basis to depart from Roberts' analytical framework, as reaffirmed in Wright. Any implication in footnote 5 of Lee that a statement against penal interest is somehow less trustworthy than any other firmly-rooted hearsay exception is unwarranted. "Admission under a firmly rooted hearsay exception satisfies the

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[12] The Respondent's own confession, also acknolwedges that he did in fact make this statement.

[13] The Florida Supreme Court had previously read Cruz to allow codefendant confessions to be admissible if their "interlocking" nature showed them to be reliable. See Grossman v. State, 525 So. 2d 833, 838 (Fla. 1988). Relying on Grossman, the trial court had thus deemed Gonzalez's statement admissible because it and Defendant's statements were "as concern[ed] all material details, indistinguishable" and therefore "contain[ed] the indicia of reliability necessary to allow their introduction during a joint trial as direct evidence." (R.127). In Franqui I, the court concluded that Grossman was no longer viable in the wake of Wright's holding that the indicia of reliability must be intrinsic to the statement or the declarant. Franqui I, 699 So. 2d at 1319. Because the trial court relied on Grossman, (as did both parties on appeal, with Defendant arguing that the statements were not truly interlocking) the trial court made no determination as to whether the statement was truly self-inculpatory. There is no reason, however, why this question, which merely requires a reading of the statement, could not be performed on appeal. Indeed the Florida Supreme Court did just that with regard to the codefendant's second statement in Franqui I. 699 So. 2d at 1320.

constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." Wright, 497 U.S. at 817.

Because the Florida Supreme Court applied an incorrect standard in determining whether the statement against penal interest exception to the hearsay rule is "firmly rooted," and because this constitutional issue is one of conflict among the lower courts, the Court should accept jurisdiction to resolve the question.

B. The Florida Supreme Court erred in determining that a codefendant's statement can never exhibit sufficient particularized guarantees of trustworthiness to be admitted against the defendant unless it does not mention the defendant at all, regardless of whether the statement was wholly self-inculpatory, thoroughly interlocked with the defendant's confession, and was made after a knowing and intelligent waiver of constitutional rights.

Under Roberts, 448 U.S. at 64-66, and Wright, 497 U.S. at 814-15, if a statement does not fall within a firmly-rooted exception to the hearsay rule, it is inadmissible in the absence of evidence demonstrating particularized guarantees of trustworthiness. In Lee, 476 U.S. at 543, and Cruz, 481 U.S. at 194, the Court noted that even a codefendant's statement that satisfies this standard may be admissible directly against a defendant. Further, in Williamson, 114 S. Ct. at 2437, Justice O'Connor stated that "the very fact that a statement is truly self-inculpatory ... is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."

Even assuming that the exception for statements against penal interest is not firmly rooted, the Florida Supreme Court has misconstrued the Confrontation Clause. The Florida Supreme Court, citing Justice O'Connor's statement in Williamson quoted above, concluded that the a codefendant's statement against penal interest demonstrates sufficient particularized guarantees of trustworthiness to be admissible.[14]

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[14] A number of courts, including those that have either rejected the notion that the penal interest exception is firmly rooted, or declined to decide the issue, have held that the statement's truly self-inculpatory nature constitutes a sufficient particularized guarantee of trustworthiness so as to allow the statement to be admitted. See, e.g., United States v. Barone, 114 F.3d 1284, 1301 (1st Cir. 1997); State v. Wilson, 18 P.2d 826, 837 (Or. 1996)

The court's error lies in its conclusion that to be "genuinely self-inculpatory" a statement must be "individually self-inculpatory," i.e., it must contain no reference whatsoever to the defendant. Franqui I, 699 So. 2d at 1320; see also San Martin, 1997 WL at *4, *13 (the admission of Franqui's confession was held to be error because it "implicate[d] San Martin in the planning and execution of this crime," despite the fact that "[i]n both confessions, San Martin was portrayed as an equal participant in this enterprise"). As discussed above, at Subpoint A, however, Williamson makes it clear that such a formalistic approach is inappropriate. The question is not whether the declarant mentions or inculpates any others in the course of his statement, but rather whether he fully inculpates himself. Although Williamson only addressed an evidentiary issue under the Federal Rules of Evidence, its misreading by the Florida Supreme Court still presents a basis for granting the writ because its overly-narrow reading of the case led to its conclusion that all statements by accomplices that mention the defendant violate the Sixth Amendment.

A "truly self inculpatory" statement is one of the particularized guarantees of trustworthiness, in part, also because it is not an attempt to shift blame or curry favor. Williamson, 114 S.Ct. at 2437. As noted in Subpoint A at pp. 14-15, supra, the codefendant's statement herein, although mentioning the defendant in the context of a joint enterprise, thoroughly inculpated the codefendant himself and did not constitute an attempt to shift blame or curry favor. The self-inculpatory nature of the statement was thus itself a

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State v. Mullaly, 1997 WL 651649, *4 (Wash. App. Oct. 9, 1997)(unpublished opinion); People v. Greenberger, 68 Cal. Rptr. 2d 61, 79 (App. 1997); People v. Thomas, 1997 WL 576337, *12 (Ill. Sept. 18, 1997); State v. Nielsen, 853 P.2d 256, 268 (Or. 1991). Others have suggested that the custodial statements of codefendants may never be admitted. See, e.g., Olson, noted above.

particularized guarantee of trustworthiness that should have been, but was not, considered by the court below in determining admissibility under the Confrontation Clause.

A custodial statement by a codefendant such as that herein, however, bears other guarantees of trustworthiness. For example, before such statements may be admitted at trial, the State has the burden of establishing that such statements were made voluntarily -- i.e., that the confession was a product of free will, without coercion, duress or deception at the time of making the statement. Jackson v. Denno, 378 U.S. 368 (1964).[15] The State also bears the burden of establishing that such statements were made only after procedural safeguards were honored -- i.e., that Miranda[16] warnings were given -- and must show that the declarant waived the Miranda rights knowingly, intelligently and voluntarily. Miranda, 384 U.S. at 479. The trial court herein did in fact make pretrial determinations that both of these requirements had been met. Escobar, 699 So. 2d at 993. These factors too, which bear directly on the circumstances surrounding the making of the statement, must also be considered in the trustworthiness determination. Wright, 479 U.S. at 820 ("We think the 'particularized guarantees of trustworthiness' required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.").

Finally, the statements in the instant case were interlocking in every material respect, as seen in Subpoint A

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[15] See also Land v. State, 293 So. 2d 704 (Fla. 1974), Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989), and Fla. R. Crim. P. 3.190, incorporating the requirements of Denno.

[16] Miranda v. Arizona, 384 U.S. 436 (1966).

herein. The State submits that this, too, was a factor that should have been considered by the court below, but was not, in its consideration of particularized guarantees of trustworthiness. Cruz, 481 U.S. at 192 ("Quite obviously, what the 'interlocking' nature of the co-defendant's confession pertains to is not its harmfulness but rather its reliability") (emphasis added). Thus, in Cruz, it was noted that, "[o]f course, the defendant's confession may be considered at trial in assessing whether his co-defendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him." 481 U.S. at 193-94 (citing Lee, 476 U.S. at 543-44). The court below recognized these statements in Cruz, but held that this Court had modified Cruz in Wright and thus the interlocking nature of statements could not be considered. Franqui I, 699 So. 2d at 1318-19. The State submits that the interlocking nature of the statement is a circumstance which at least renders "the declarant particularly worthy of belief," as required in Wright, 497 U.S. at 820, especially when considered in conjunction with the truly self-inculpatory content of the statement which does not attempt to shift responsibility, along with the voluntariness of the statement, and the fact that it was made after advisement and waiver of constitutional rights.

The State recognizes that in Wright, 497 U.S. at 823 n.*, this Court stated that in Cruz, it had "said nothing about whether the co-defendant's confession would be admissible against the defendant simply because it may have 'interlocked' with the defendant's confession." (Emphasis added). However, this is not a case of only relying on the fact that the defendant's and codefendant's statements interlock. It is respectfully submitted that the interlocking content is one factor, in conjunction with the other factors cited above, that may be considered in determining whether the statement bears sufficient indicia of reliability to overcome any presumption of unreliability.

Because the Florida Supreme Court has read Williamson to require the exclusion, on Sixth Amendment grounds, of all codefendant statements that mention the defendant, and has disregarded other legitimate factors reflecting trustworthiness, and because these issues are the subject of conflict among the courts, the Court should accept jurisdiction.

II.

THE FLORIDA SUPREME COURT'S HARMLESS ERROR ANALYSIS IS FLAWED FOR FAILING TO CONSIDER THE DEFENDANT'S CORROBORATING CONFESSION ON APPEAL, CONTRARY TO IDAHO V. WRIGHT AND CRUZ V. NEW YORK.

The Florida Supreme Court's harmless error analysis in the instant case is contrary to the express dictates of Cruz and Wright. In Franqui I, the court below recognized that, "it is equally clear that the interlocking nature of the confession is likely to render the Confrontation Clause violation harmless on appellate review." Franqui I, 699 So. 2d at 1321.[17] The lower court thus concluded: "while that portion of [the codefendant's] confession which implicated Franqui should not have been introduced into evidence, the fact that it mirrors Franqui's confession in so may respects strongly indicates that the error was harmless." Id. In the instant case, however, the court distinguished Franqui I on the grounds that that case involved a charge of felony murder, whereas the instant case involves premeditated murder. Escobar, 699 So. 2d at 992. The Florida Supreme Court stated:

> Within Dennis Escobar's statement that the trial court allowed into evidence is information which incriminated appellant, including Dennis's assertion that appellant told Dennis to shoot

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[17] See Cruz, 481 U.S. at 193-94 ("Of course, the defendant's confession may be considered . . . on appeal in assessing whether any Confrontation Clause violation was harmless."); Wright, 497 U.S. at 823 (presence of corroborating evidence indicates that error in admitting hearsay evidence may be harmless).

> Estefan. The State extensively used Dennis's statement against appellant in support of the state's argument that appellant was guilty of premeditated murder. From our review of the record, we cannot find the error to be harmless in this case.

Id. The above harmless error analysis, which finds that codefendant Dennis's statement, with respect to the Respondent having told him to shoot, was reversibly prejudicial, entirely disregards the fact that Respondent's own confession contained the same statement. The Respondent himself admitted that he had told the codefendant Dennis to shoot the victim:

> Q. What conversation does Douglas Escobar tell you takes place between himself and his brother in the car at around the time that the police pulls behind him?
>
> MR. CARTER: Note my objection.
>
> THE COURT: Objection is noted.
>
> THE WITNESS Douglas told me that he had told his brother that if the policeman gets out, you shoot him.

(T. 5210-11) (emphasis added).

The Respondent's own confession, which is powerful evidence of guilt, thus contains the identical statement with respect to premeditation. Not only does the Respondent's confession mirror that of the codefendant, but it should also be noted that the remainder of the evidence as to premeditation was

not contained in the codefendant's statements and thus not tainted in any way.

Apart from the confession to police, the State established that on at least two separate occasions, within less than a month prior to the murder herein, the Respondent had told his friends that he carried a gun and would kill if stopped by the police, rather than going back to jail. As noted by the court below, Respondent told neighbor Bonilla that "he carried a gun and he would kill a police officer before he would go back to jail." Escobar, 699 So. 2d at 998. On another occasion, Respondent, displaying a weapon and in the presence of the codefendant, told friend Douglas Saballos that he was wanted in California, "and that he wasn't going to be taken back, that he was, you know, willing to get to break anybody that would try to stop him." (R. 4819-22, 4843, 4853-54).

The State thus respectfully submits that the harmless error analysis herein, which is based solely upon a distinction that the instant case is a premeditated murder charge as opposed to a felony murder case, is flawed. The prejudicial aspect of the codefendant's confession identified by the lower court - that Respondent told codefendant to shoot - is identical to that contained in the Respondent's own confession. Moreover, Respondent's preexisting intent and motive were established by independent evidence separate and apart from the codefendant's confessions to police. Thus, pursuant to Cruz, Wright, and even the lower court's own decision in Franqui I, the admission of the codefendant's confession should have been deemed harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,
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APPENDIX

Supreme Court of Florida

DOUGLAS MARTIN ESCOBAR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

No. 77,736

REVISED OPINION

[July 10, 1997]

PER CURIAM.

Douglas Escobar appeals his conviction for first-degree murder and sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We find reversible error in the trial court's granting of the State's motion for rejoinder of codefendants. Accordingly, we reverse the convictions and sentences for first-degree murder and for possession of a firearm during the commission of a felony. We remand for proceedings consistent with this opinion to begin within 180 days of the filing of this opinion.

Appellant and his brother, Dennis Escobar, were convicted of first-degree premeditated murder, possession of a firearm during the commission of a felony, and grand theft of an

automobile. Through a combination of the brothers' confessions, testimony from Dennis Escobar's wife, testimony from a friend, and physical evidence, the following facts were presented to the jury. During a day-long drinking binge on March 30, 1988, the Escobar brothers were traveling in a gray Mazda they had stolen a few days earlier from a Miami car dealer. Douglas was driving and Dennis was a passenger when the brothers saw a police car following them. Douglas tried to evade the officer by pulling into a residential yard. The police car stopped behind them. Douglas said to Dennis, "If he gets out, shoot him." The officer, Victor Estefan, exited his car with his gun drawn and shouted for the brothers to exit their car. As Estefan approached, Dennis got out, fired three or four shots at Estefan with a .357 magnum handgun, and returned to the Mazda. Douglas backed the Mazda into Estefan's patrol car before driving off. The brothers had the Mazda washed to eliminate fingerprints, abandoned the car, and threw the gun into a canal. Police recovered the stolen car and found physical evidence indicating that the car had hit Estefan's patrol car. A fingerprint from Douglas was found on the stolen Mazda.

There were no eyewitnesses or suspects the night of the shooting. Just before he died of gunshot wounds, Estefan described his assailant as a white male passenger in a gray Mazda, which Estefan had stopped because it was traveling without lights. A month later, Miami police received information from California police implicating the Escobar brothers in the Estefan shooting. Two Miami police detectives traveled to California to meet with Dennis and Douglas Escobar, who were in custody in a California medical facility where they were recovering from wounds received in a shoot-out with

California Highway Patrol officers.[18] The Escobars individually confessed to participating in the murder of Estefan in Miami.

Prior to trial, appellant and his codefendant each filed motions for severance of their trials. Originally, the trial court allowed separate trials. However, the court subsequently granted the State's motion for rejoinder based upon a 1990 amendment to the Florida Evidence Code.[19] The court then denied motions for severance during both the guilt and penalty-phase proceedings. The brothers were tried jointly. Neither defendant testified during the guilt or penalty phases of the joint trial. The jury found appellant guilty of all charges and, by a vote of eleven to one, recommended the death penalty. The trial court followed the recommendation, finding two aggravating factors: (1) previous conviction of a violent felony;[20] and (2) the victim was a law enforcement officer engaged in the lawful performance of official duties.[21] The court found one

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[18] Douglas and Dennis Escobar were tried and convicted in April 1989 of attempted first-degree murder for shooting a California Highway Patrol trooper who had stopped the Escobars for an alleged traffic violation in April 1988. Both Dennis and Douglas Escobar were sentenced to life in prison in California.

[19] Effective October 1, 1990, the legislature deleted from the hearsay exception of statement against interest, section 90.804(2)(c), Florida Statutes (1989), the following provision:

> A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

Ch. 90-174, § 4, at 744-45, Laws of Florida.

[20] § 921.141(5)(b), Fla. Stat. (1989).

[21] § 921.141(5)(j), Fla. Stat. (1989).

nonstatutory mitigating factor: appellant came from a broken home. The trial court sentenced appellant to death.

Appellant raises seventeen issues in this direct appeal.[22] In reversing appellant's convictions and sentence, we need address only issue seven, in which appellant argues that the trial court erred in granting the State's motion for rejoinder of his trial with that of his codefendant and the admitting into evidence of incriminating portions of the codefendant's out-of-court

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[22] Appellant claims that: (1) the trial court erred in denying appellant's motion to suppress statements, confessions, and admissions; (2) appellant was denied his right to effective assistance of counsel because a court-appointed attorney jointly represented appellant and his codefendant for purposes of an interlocutory appeal; (3) the Third District Court of Appeal erred in ruling that evidence concerning appellant's statement, collateral crimes, and arrest warrants was admissible; (4) the trial court erred in admitting photographs and sketches concerning appellant's collateral crimes; (5) the trial court erred in admitting testimony that appellant was known as the "bandit of Camino Real" and that appellant once held a pistol to a friend's chest; (6) a special master erred in ruling that the trial judge did not conduct ex parte communications with the prosecutor regarding the State's motion for rejoinder; (7) the trial court erred in granting the State's motion for rejoinder or consolidation of appellant's trial with that of his codefendant; (8) the trial court erred in refusing to allow appellant to cross-examine the State's expert witness at a competency hearing; (9) the trial court erred during jury selection in refusing to conduct an inquiry pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984), into the State's nine challenges of minority prospective jurors; (10) the trial court erred in restricting appellant's use of challenges during jury selection; (11) the evidence was insufficient to show that appellant committed first-degree murder; (12) the cumulative effect of the foregoing errors requires reversal; (13) a special master erred in ruling that the trial judge and prosecutor did not engage in ex parte communications the day before sentence was pronounced; (14) the trial court erred during the penalty phase in refusing to give a limiting instruction regarding the doubling of aggravating factors; (15) the trial court erred during the penalty phase in excluding testimony of four witnesses who had just arrived from Nicaragua; (16) the State's use of similar-fact evidence during the guilt phase affected the jury's determination in the penalty phase; (17) the death penalty is not warranted under a proportionality review.

statement. However, for purposes of the new trial, we address issues one, three, four, and five. We find issues two, six, and eight through seventeen to be moot in light of our decisions on these other issues.

As to our reason for reversal, we agree with appellant's contention that the trial court erred by granting the State's motion for rejoinder of the two defendants by denying appellant's repeated motions to have his trial severed from that of his codefendant and then by admitting into evidence at the joint trial the codefendant's statement, which incriminated appellant. Appellant argues specifically that the trial court's failure to grant a severance violated his federal constitutional right to confront his codefendant, who did not testify at their joint trial, as to those portions of the codefendant's confession admitted at trial that incriminated appellant in the shooting death of Estefan. Our agreement with this contention compels us to reverse appellant's conviction and sentence and to remand for a new trial.

In Franqui v. State, 22 Fla. L. Weekly S 373 (Fla. June 26, 1997), we extensively reviewed the use of interlocking confessions of codefendants in joint trials. For the reasons stated in our opinion in Franqui, we reject the State's contention that the 1990 amendment to the Florida Evidence Code was a proper basis upon which to admit appellant's codefendant's confession incriminating appellant in this joint trial, and we determine that the admission of those portions of Dennis Escobar's statement was error.

As we further decided in Franqui, this error is subject to a harmless error review. This case differs from Franqui in that there was no charge of felony murder here. The jury was instructed only as to premeditated first-degree murder. Within Dennis Escobar's statement that the trial court allowed into

evidence is information which incriminated appellant, including Dennis's assertion that appellant told Dennis to shoot Estefan. The State extensively used Dennis's statement against appellant in support of the State's argument that appellant was guilty of premeditated murder. From our review of the record, we cannot find the error to be harmless in this case.

For the new trial, the trial court is to again consider whether appellant and Dennis Escobar can be tried jointly. The trial court is to apply in this decision Florida Rule of Criminal Procedure 3.152(b)(2)[23] if the State intends to offer Dennis Escobar's statement against appellant in a joint trial. In the new trial, whether it is a joint trial or a separate trial for appellant, only those statements in the confession of Dennis Escobar which

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[23] Florida Rule of Criminal Procedure 3.152(b)(2) provides:

> If a defendant moves for a severance of defendants on the ground than an oral or written statement of a codefendant makes reference to him or her but is not admissible against him or her, the court shall determine whether the state will offer evidence of the statement at the trial. If the state intends to offer the statement in evidence, the court shall order the state to submit its evidence of the statement for consideration by the court and counsel for defendants and if the court determines that the statement is not admissible against the moving defendant, it shall require the state to elect 1 of the following courses:
>
> (A) a joint trial at which evidence of the statement will not be admitted;
>
> (B) a joint trial at which evidence of the statement will be admitted after all references to the moving defendant have been deleted, provided the court determines that admission of the evidence with deletions will not prejudice the moving defendant; or
>
> (C) severance of the moving defendant.

are admissible in compliance with our opinion in Franqui are to be admitted in the new trial.

We now move to appellant's issue number one. We reject appellant's claim that the trial court erred in failing to suppress appellant's confession because it was involuntary. The trial court held an evidentiary hearing and then denied appellant's motion to suppress statements that appellant made to law-enforcement officers on April 30, 1988, May 3, 1988, and May 28, 1988.[24] Only the April 30, 1988 statements by appellant were offered into evidence by the State and admitted by the trial court.

Appellant argues that the trial court erred in denying appellant's motion to suppress and admitting appellant's statements of April 30 into evidence because his medical condition, which required his being administered morphine, prevented his waiver of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), from being knowing, intelligent, and voluntary. These statements were given while appellant was hospitalized in Templeton, California, for wounds received in the shoot-out with California Highway Patrol officers.

The trial court held an extensive evidentiary hearing on appellant's motion to suppress. At the hearing, the defendant presented testimony of a nontreating psychiatrist and one of appellant's treating physicians. The psychiatrist testified based

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[24] Appellant's brief states that appellant made a statement during the night of April 27-28. However, the State's brief states that what is referred to as the April 27 statement was actually made on May 28. Appellant's reply brief does not rebut the State on this point. In the record of the suppression hearing, appellant's counsel refers to a statement by appellant on May 28. The trial court ruled on a statement it stated was dated May 28. We find this confusion to be of no import because the State did not offer a statement of May 28. We therefore make no decision regarding any statement of May 28.

upon her review of the hospital records. These physicians opined that in view of the dosage of morphine given to appellant, appellant could not have knowingly, intelligently, and voluntarily waived his Miranda rights. In rebuttal, the State pointed to the hospital records for April 30 and contended that hospital records indicated that appellant's vital signs were stable and that appellant was alert and active. In answer to the trial court's question, the treating physician acknowledged that if appellant had been irrational or unresponsive during his visits, he would have so noted in his physician's notes which form part of the hospital records. There were no such notations. The State also presented a treating nurse who attended appellant for three days prior to and including April 30, 1988. She testified that appellant was awake and oriented as to time, place, and circumstances. The nurse testified that appellant had a very high tolerance for morphine.

At the conclusion of the evidentiary suppression hearing, the trial court noted that the psychiatrist had never personally attended appellant. The court further noted that the treating physician had not recorded anything about appellant being irrational on April 30. Based upon the testimony and the hospital records, the court found the nurse to have been the more credible of the witnesses. The court also found that appellant's Miranda waiver was knowing, intelligent, and voluntary.

A trial court's ruling on a motion to suppress is presumptively correct. Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985). When evidence adequately supports two conflicting theories, our duty is to review the record in the light most favorable to the prevailing theory. Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995), cert. denied, 116 S. Ct. 1550 (1996). The fact that the evidence is conflicting does not in itself show that the State failed to meet its burden of showing by a preponderance of the evidence that the confession was freely and

voluntarily given and that the rights of the accused were knowingly and intelligently waived. Id.; Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989). Based upon our review of the record of the suppression hearing, we conclude that the trial court's decision was based on competent, substantial evidence. Accordingly, we affirm the trial court's denial of the motion to suppress the confession on the grounds of involuntariness related to the appellant's medical condition.

Appellant also contends that the second statement appellant made to police on April 30 was not immediately preceded by Miranda warnings. This statement was made approximately six hours after the first statement. There is no requirement of additional warnings during the same period of interrogation if it is clear that detainees are aware of their rights. Johnson, 660 So. 2d at 642. The record reflects that appellant received proper Miranda warnings before the overall interrogation began and that appellant was aware of his rights when he made all of his statements. Accordingly, we find no error related to the timing of appellant's Miranda warnings.

Finally, appellant argues that his confession should have been suppressed because police detectives deluded him before he gave his statements by falsely stating that they had obtained physical evidence and by failing to inform him that he could be sentenced to death. However, appellant did not raise this argument in his motion to suppress or in the suppression hearing. Therefore, it is procedurally barred. Tillman v. State, 471 So. 2d 32, 34-35 (Fla. 1985). Even if it were not procedurally barred, we would reject appellant's contention. Police misrepresentation alone does not necessarily render a confession involuntary. Frazier v. Cupp, 394 U.S. 731 (1969); Burch v. State, 343 So. 2d 831 (Fla. 1977); Grant v. State, 171 So. 2d 361 (Fla. 1965). The determination of voluntariness is based upon the totality of the circumstances, with the

determination to be made by the judge based on a multiplicity of factors. Traylor v. State, 596 So. 2d 957, 964 (Fla. 1992). In this case, we find no abuse of the trial court's discretion in finding from the totality of the circumstances that the confession was voluntary.

We conclude that appellant's confession was not legally the result of coercion, deception, or the violation of constitutional rights. Accordingly, we find no error in the trial court's ruling that appellant's statements were freely and voluntarily given to police after appellant knowingly and intelligently waived his Miranda rights.

As to issue three, the trial court first considered the issue of the admissibility of evidence concerning the California shoot-out when the State filed a notice of intent to rely upon Williams rule evidence.[25] This evidence consisted of: (1) a statement appellant made to his neighbor, Angel Bonilla, prior to the Estefan murder; (2) testimony indicating that appellant and his codefendant fled from and engaged in a shoot-out with California Highway Patrol officers one month after the Estefan shooting; and (3) testimony concerning two California arrest warrants (for robbery and unlawful flight to avoid prosecution) against appellant which were outstanding at the time of the Estefan

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[25] In Williams v. State, 110 So. 2d 654 (Fla. 1959), we held that similar fact evidence, such as testimony concerning a collateral crime, is not admissible if it goes only to show a defendant's bad character or propensity. Id. at 662. Williams has been codified as section 90.404(2)(a), Florida Statutes (1989), which is known as the Williams rule and provides:

> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

shooting. The trial court ordered that the evidence could not be admitted. The State petitioned for certiorari review of this order to the Third District Court of Appeal. The district court granted certiorari and quashed the trial court's order. State v. Escobar, 570 So. 2d 1343, 1346 (Fla. 3d DCA 1990). Based upon a de novo review of the issues decided by the district court, we agree with the district court rulings as they were applied in the trial in respect to the evidence of the statement made to the neighbor and the testimony concerning the California arrest warrants. We do not agree with the trial court's application in the trial of the district court's ruling regarding the California shoot-out as evidence of consciousness of guilt or identity.

The district court ruled in respect to the California shooting incident:

> Turning to the issues raised by the State in its petition for certiorari, we conclude that the trial court departed from the essential requirements of the law in excluding evidence that one month after the murder of Officer Estefan the defendants fled from and engaged in a shoot-out with California Highway Patrolmen who were attempting to apprehend the Escobars for a traffic violation. When suspected persons in any manner attempt "to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstances." Straight v. State, 397 So. 2d 903, 908 (Fla.) (citations omitted), cert. denied, Straight v. Florida, 454 U.S. 1022, 102 S. Ct. 556, 70 L. Ed. 2d 418 (1981). See Perez

> v. State, 539 So. 2d 600 (Fla. 3d DCA 1989) (evidence that defendant fled when police attempted to apprehend him admissible). Here, the Escobars were willing to use deadly force to try to avoid arrest. This evidence is probative of defendant's mental state and is, therefore, admissible. Straight, 397 So. 2d at 908.

570 So. 2d at 1345.

We agree, as an abstract rule of law, that evidence of flight, concealment, or resistance to lawful arrest after the fact of a crime is admissible as "being relevant to consciousness of guilt which may be inferred from such circumstances." Straight v. State, 397 So. 2d at 903, 908 (Fla. 1981). However, in applying this principle to a particular case, there must be evidence which indicates a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in that specific case. This is necessary in the application of this rule of law since the evidence creates an inference of a consciousness of guilt of the crime for which the defendant is being tried in that case. See Merritt v. State, 523 So. 2d 573, 574 (Fla. 1988). The ultimate admissibility issue is the relevance to the charged crime.

In Bundy v. State, 471 So. 2d 9 (Fla. 1985), we specifically pointed to the fact that Bundy had fled from a law enforcement officer two days after the victim's murder and that evidence of Bundy's flight from police six days after the victim's murder included a showing that the victim's disappearance had generated widespread publicity in areas where Bundy and law enforcement officers were during the time between the murder and Bundy's arrest resistance. Id. at 21. In Bundy, we cited United States v. Borders, 693 F.2d 1318 (11th Cir. 1982):

> In Borders, the court noted that the cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. For instance, the probative value of flight evidence is weakened: 1) if the suspect was unaware at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, United States v. Beahm, 664 F.2d 414, 419-20 (4th Cir. 1981); 2) where there were not clear indications that the defendant had in fact fled, Myers, 550 F.2d at 1049-50; or, 3) where there was a significant time delay from the commission of the crime to the time of flight. See, e.g., United States v. Howze, 668 F.2d 322, 324-25 (7th Cir. 1982); Myers; United States v. White, 488 F.2d 660, 663 (8th Cir. 1973). The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. Borders, 693 F.2d at 1325.

471 So. 2d at 21. This last statement in Borders that "[t]he interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case," 693 F.2d at 1325, is of particular import in the application of the rule of law.

In Merritt, we respected this statement from Borders when we distinguished the admission of flight evidence in Bundy on the basis of the facts of Merritt, pointing out that in Bundy the flight occurred only a few days after the victim's much publicized disappearance. 523 So. 2d at 574. We reversed Merritt's conviction and sentence and remanded for a new trial because of the admission of evidence of Merritt's escape nine months after Merritt became aware of the investigation of the

murder for which he was being tried. Id. We found that because of the time period of nine months and because the escape occurred during Merritt's being transported from Virginia to Florida for trial on unrelated charges there was insufficient evidence for the jury to reasonably infer that Merritt escaped to avoid prosecution for the murder for which Merritt was being tried. Id.

Similarly, we do not find a sufficient evidentiary nexus in the record of this trial to have permitted the jury in this case to reasonably infer that appellant's acts in resisting arrest in California were related to the Estefan murder. Two of the three Borders examples of situations which weaken the probative value of this type of evidence are present in this case. Not only was the California shooting twenty-seven days after the Estefan murder, but there was no evidence in the record that appellant had any reason to believe, at the time he resisted arrest in California, that he was the subject of the investigation of the Estefan murder or that he was a suspect in the Estefan murder in either Florida or California. There was no evidence that the Estefan murder had received any publicity in California. To the contrary, the evidence was that it was following the shooting incident which terminated with appellant being shot and arrested while appellant was in California law-enforcement custody that California police learned information about the Estefan murder. California law enforcement officers conveyed this information to law enforcement officers in Miami, and appellant only then became a suspect in the Estefan murder.

Furthermore, the record reveals that police had outstanding warrants against appellant in California for California crimes. We conclude that the existence of the outstanding warrants is significant. It could be reasonably inferred that the California warrants alone were the cause of appellant's attempt to flee the California police. This issue

differs from the one in Freeman v. State, 547 So. 2d 125 (Fla. 1989), in which Freeman contended that evidence of flight was irrelevant to the charge for which he was being tried because at the time of his escape attempt he was charged with another crime which might have resulted in a more serious penalty. Id. at 128. The difference between Freeman and this case is that Freeman was incarcerated for both offenses and it could reasonably be inferred that he attempted to avoid penalties for both. Id.

The State also contends that this case is similar to Straight and Wyatt v. State, 641 So. 2d 1336 (Fla. 1994), in which we found no error in the admission of portions of evidence concerning resistance to lawful arrest as relevant to consciousness of guilt. We find the circumstances in both Straight and Wyatt to be distinguishable from the facts of this case. Our opinion in Straight does not state the time period which lapsed between the Florida murder for which Straight was being tried and Straight's resistance of arrest in California by firing at California officers. 397 So. 2d at 905. However, in Straight there was a sufficient nexus between Straight's California resistance to arrest and the Florida murder for the jury to infer consciousness of guilt of the Florida murder. Also, there was no evidence that Straight had any outstanding California warrants for which he would have resisted arrest in California. Likewise, we distinguish Wyatt, in which we approved the admission of a portion of the evidence concerning Wyatt's resisting arrest. 641 So. 2d at 1339. In Wyatt, we found that there was sufficient evidence to support the conclusion that Wyatt was fleeing prosecution for the murders for which he was being tried. Id. The facts which we have detailed in this opinion make this case factually distinct from Wyatt. It should be noted that in Wyatt we did find error in the admission of evidence that Wyatt stole two cars a week or more after the murders because that evidence was not sufficiently probative of flight. Id.

Based upon the totality of the present evidence, to infer that appellant resisted arrest in California because appellant was conscious of his guilt of the Estefan murder is simply not a reasonable inference. Thus, we conclude on the basis of the trial record that the evidence concerning the California shooting was not admissible to show consciousness of guilt because there was insufficient nexus evidence to make it relevant.

The Third District also held that there was another basis for the admission of this evidence against appellant:

> Evidence of the California shoot-out was also relevant to establish Douglas's involvement in the Estefan murder in view of his asserted defense that Dennis was the primary perpetrator and triggerman in the killing. See Remeta v. State, 522 So. 2d 825 (Fla.) (testimony regarding robberies and murders committed by defendant in Texas admissible to refute defendant's statements blaming accomplice for similar crimes committed in Florida), cert. denied, Remeta v. Florida, 488 U.S. 871, 109 S. Ct. 182, 102 L. Ed. 2d 151 (1988); Baker v. State, 241 So. 2d 683 (Fla. 1970) (evidence that codefendant was actor in another robbery three or four hours after crime charged relevant to question of his involvement in the crime charged); Cornelius v. State, 457 So. 2d 579 (Fla. 2d DCA 1984) (participation by defendant wife with her husband in prior criminal act was sufficient to justify admission of prior act under "Williams Rule" notwithstanding that wife was principal actor in crime charged and not principal actor in prior criminal act).

570 So. 2d at 1345. We agree that Remeta is similar. As in Remeta, we agree that evidence that appellant shot at the law enforcement officer in the California traffic stop was relevant to rebut appellant's contentions that it was Dennis Escobar who shot Estefan in Miami, that appellant did not tell him to do it, and that appellant was merely in the vehicle with Dennis. However, we do not agree that the evidence was relevant to prove identity because appellant did not deny identity in the trial. The instruction which the court gave in respect to this testimony, which instruction refers to consciousness of guilt and identity, highlighted the erroneous reasons for the admission of this testimony.[26] Furthermore, as appellant argues in issue four, the substantial testimony and number of exhibits entered into evidence by the trial court regarding the California shoot-out violated the rule that evidence of collateral crimes must not become the feature of a trial. See Steverson v. State, 22 Fla. L. Weekly S345 (Fla. June 12, 1997); Stano v. State, 473 So. 2d 1282, 1289 (Fla. 1985). Photographs relevant to the California shoot-out and a sketch portraying the scene of the shoot-out shall not be admitted in the new trial.[27]

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[26] The instruction was:

> [T]he testimony, the evidence, which you are about to receive from this witness, some of it concerns evidence of other crimes allegedly committed by the defendants and will be considered by you for the limited purpose of proving consciousness of guilt as to both defendants and as to identity insofar as Douglas Escobar is concerned and you should consider it only as it relates to those issues.

[27] Our review of the written trial record indicates that the sketch and eight photographs relevant to the California shoot-out were admitted as exhibits in the trial. However, the record forwarded to this Court contains only three photographs of the shoot-out scene and a photograph of the injured California law enforcement officer.

In the new trial, the California shoot-out with law-enforcement officers can be introduced only through limited evidence for two purposes. The first is to rebut any assertion by appellant that Dennis Escobar acted alone and without any direction from appellant or participation by appellant in the Estefan murder. The second is to show the context of why appellant was hospitalized and under treatment when he made statements to law enforcement officers concerning the crimes for which he is being tried in this case.

We do not agree with appellant in respect to the other evidence he challenges in his third issue and which the district court found to be admissible. The first of these items of evidence was Angel Bonilla's testimony that appellant told Bonilla he carried a gun and he would kill a police officer before he would go back to jail. We conclude that the statement is admissible pursuant to section 90.803(3)(a)(1),(2), Florida Statutes (1989).[28] The statement is relevant to appellant's motive for the murder of Estefan, and it is a statement of a plan establishing appellant's then existing state of mind and

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[28] Section 90.803(3)(a)(1) and (2), Florida Statutes (1989), provides, in relevant part, a hearsay exception for:

> (3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION.--
>
> (a) A statement of the declarant's then existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:
>
> 1. Prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when such state is an issue in the action.
>
> 2. Prove or explain acts of subsequent conduct of the declarant.

explaining his subsequent conduct. We held a similar statement to be admissible in Jones v. State, 440 So. 2d 570, 577 (Fla. 1983). We here hold that appellant's statement to Bonilla is a relevant exception to the hearsay rule and may properly be admitted against appellant in his new trial. Likewise, for the reasons stated by the district court, 570 So. 2d at 1345-46, we believe the evidence concerning the outstanding California warrants was admissible. The existence of the outstanding warrants is relevant to show appellant's motive for participating in the Estefan murder.

Appellant further asserts that even if the testimony about appellant's statement to Bonilla and the prior crimes and arrest warrants is relevant, this evidence is so inflammatory that its probative value is outweighed by its prejudicial effect in violation of section 90.403, Florida Statutes (1989). Almost all evidence introduced during a criminal prosecution is prejudicial to a defendant. Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988). In reviewing testimony about a collateral crime that is admitted over an objection based upon section 90.403, a trial judge must balance the import of the evidence with respect to the case of the party offering it against the danger of unfair prejudice. Id. Evidence should be excluded only when unfair prejudice substantially outweighs the probative value of the evidence. Id. Based upon our review of the record, we conclude that the trial judge correctly admitted evidence regarding appellant's statement to Bonilla and outstanding arrest warrants. See, e.g., Williamson v. State, 681 So. 2d 688, 696 (Fla. 1996), cert. denied, 117 S. Ct. 1561 (1997); Jackson v. State, 522 So. 2d 802, 806 (Fla. 1988); Washington v. State, 432 So. 2d 44, 47 (Fla. 1983). We find that the import of the evidence outweighs the danger of unfair prejudice.

As to appellant's fifth issue, we agree with his contention that the testimony by Douglas Saballos that appellant bragged

about being known as the "bandit of El Camino Real" because he was wanted for a "chain of holdups" should not be admitted into evidence at the new trial. Likewise, the testimony of Ramon Arguello, an acquaintance of appellant, that appellant had once held a pistol to a Arguello's chest and had threatened to kill him should not be admitted. These statements concerning these crimes and acts are inadmissible pursuant to section 90.404, Florida Statutes (1989), because the evidence is relevant solely to prove bad character. Accordingly, we direct the trial court to exclude in appellant's new trial the above-mentioned testimony by Saballos and Arguello.

In conclusion, we reverse appellant's convictions and sentences for first-degree murder and possession of a firearm during the commission of a felony. We do not disturb the conviction and sentence for automobile theft, which appellant did not challenge. Accordingly, we remand for a new trial.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.

ANSTEAD, J., concurs in result only.

Supreme Court of Florida

THURSDAY, OCTOBER 2, 1997

DOUGLAS MARTIN ESCOBAR, Appellant,

vs. CASE NO.77,736
Cir. Ct. Case No. 89-11887B

STATE OF FLORIDA, Appellee.

Appellant's Motion for Rehearing filed by Appellee, having been considered in light of the revised opinion [A1-A20], is hereby denied.

A True Copy

TEST

Sid J. White
Clerk, Supreme Court

JB
cc: Hon. Harvey Ruvin, Clerk
Hon. Sidney B. Shapiro, Judge
Ms. Fariba N. Komeily
Mr. Ronald S. Lowy
Ms. Sharon Christenbury
Mr. Eric Cohen
Mr. Sheldon R. Schwartz

(2)

Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1204

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE STATE OF FLORIDA,

Petitioner,

vs.

DOUGLAS MARTIN ESCOBAR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE AND FACTS

The Respondent, DOUGLAS ESCOBAR, accepts the Petitioner's Statement of the Case and Facts as only a partially accurate account of the material facts for this Court's consideration and, accordingly, supplements the following facts where Petitioner's are incomplete and inaccurate.

A. The Petition Misrepresents the Trustworthiness and Reliability of Douglas' Statements.

DOUGLAS ESCOBAR's admission that he told the co-defendant, his brother, DENNIS ESCOBAR, to shoot the victim came during an interview with police officers shortly after major surgery at a time when DOUGLAS was listed in extremely critical condition, was suffering delirium tremens as a result of alcohol withdrawal, had been receiving extremely large doses of morphine at regular intervals for three to four days, and had a chest thoracostomy tube coming out of his chest, a catheter tube in his penis, oxygen in his nostrils and I.V. tubes in his arms. (pp. 14a-19a). There was unrebutted medical testimony that the "usual reactions of the morphine that he was receiving could really affect him, particularly his recall, and he might have been agreeing with that was being said [to him] at the time" and that the Defendant would have been "susceptible to suggestion, easily manipulated and not fully in control of his mental faculties." (pp. 14a, 19a, 20a).

During that time while DOUGLAS ESCOBAR was recovering from surgery and under heavy doses of morphine, DOUGLAS had been overheard to say, "I killed

a policeman in Miami" and "I killed an officer" and "drew gun on me, start to shoot." (p. 3a). During the interrogation conducted by Miami Police Detective George Morin, the detective informed DOUGLAS that DENNIS, the co-defendant, told the detectives that DENNIS had fired the shot that killed the officer, and that DOUGLAS did not fire the shot.[1] (pp. 10a-14a, 22a, 23a). DOUGLAS repeatedly denied his involvement in the shooting, but not his presence at the scene, saying that he is "not a killer," "only a car thief," "not a murderer," and "not a cop killer." (pp. 4a-5a, 23a). In a conflicting version, DOUGLAS also stated that he knew he was guilty and that it was difficult to confess. (pp. 7a, 25a, 26a).

B. The Petition Omits Conflicting Versions of Dennis' Statement.

Throughout the questioning by Detective Morin, DOUGLAS repeatedly expressed great concern about what DENNIS had actually told them. (pp. 6a-8a, 24a, 25a). In an effort to elicit information from DENNIS, Detective Morin told DENNIS that both DENNIS' wife and DOUGLAS had given him information about who shot the policeman. Morin told DENNIS that DENNIS' wife had told the police that DENNIS told her that DOUGLAS shot the police officer. (p. 1a). Morin separately told DENNIS that DOUGLAS informed the police that DENNIS shot the police officer. (p. 1a). During the interrogation, DENNIS had said he "felt like

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[1] The version of the shooting advanced by the STATE was consistent with the version first suggested to DOUGLAS by Detective Morin which Morin conceded he "wanted [DOUGLAS] to believe." (pp. 5a, 9a).

Morin was trying to involve him in something he was not involved in." (pp. 2a, 33a). To induce DENNIS to give a statement, Detective Morin tried to convince DENNIS that DOUGLAS had given a statement. (pp. 30a-31a).

After two unsuccessful attempts to elicit information from DENNIS, DENNIS finally agreed to speak to the detectives only after Detective Morin told DENNIS that DOUGLAS told DENNIS to shoot the police officer. (pp. 21a, 27a, 28a). DENNIS then gave a statement that, on the night of the incident, he and his wife were home alone when DOUGLAS came in and said he had just killed a policeman.[2] (pp. 28a, 34a). When Morin rejected this version and walked out, DENNIS called Morin back and said he would tell him what he wanted to know if he would leave his wife alone.[3] (pp. 28a, 29a).

Having agreed to tell the detectives what they wanted to know, DENNIS then gave a statement ultimately adopting the second version previously advocated by Detective Morin: that DOUGLAS told DENNIS "if he gets out, shoot him." (p. 31a). DENNIS' statement to Morin was given in Spanish outside the presence of any other Spanish speaking person although other Spanish speaking witnesses were readily available. (p. 34a). Trial testimony further established that Detective Morin was the victim's fellow comrade [redacted] fourteen years and

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[2] Consistent with Detective Morin's first version offered.

[3] DENNIS had expressed great concern about his wife and children and was told that his wife was in custody and that if no family members were found the Florida State Department of Health and Rehabilitative Services would take his children (pp. 2a, 35a, 36a).

that Morin was under strong departmental and political pressure to solve the crime expeditiously. (pp. 20a, 32a, 33a).

REASONS FOR DENYING THE WRIT

The Petition's legal claim, that the court below applied an incorrect standard in determining whether the statement against penal interest exception to the hearsay rule is "firmly rooted," does not warrant review by this Court. Additionally, the Petition's fact bound claim that the court below disregarded other legitimate factors reflecting trustworthiness is incorrect. The totality of the facts support the conclusion that the decision below was proper and that the Court correctly applied well-settled law.

A. The Issue Raised By The STATE Does Not Involve A Federal Question And Therefore Does Warrant Certiorari Review.

The United States Supreme Court does not sit as a court of criminal appeals to review state cases. The states are free to prescribe new, and alter existing, rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements or deprive any person of his or her constitutional rights. *Burgett v. State of Texas*, 389 U.S. 109 (1967). It is beyond the pale of the United States Supreme Court's proper function in the federal system to interfere with the constitutional power of states to promulgate their own rules of evidence or to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the Federal Constitution.

Id. "Since the law of evidence is part of the law of Procedure, each independent jurisdiction in the United States has its own laws of evidence. Thus, there are many separate bodies of evidence law in the United States as there are independent jurisdictions." John H. Wigmore, *Wigmore on Evidence* 15 (1935).

In the instant case, the Florida Supreme Court's determination of error below rested on the "indicia of reliability" of the statements made by DOUGLAS and DENNIS ESCOBAR. It relied on its contemporaneous decision in *Franqui v. State*, 699 So.2d 1312 (Fla. 1997), where it held that the interlocking nature of confessions, alone, cannot provide the basis upon which to determine whether there are sufficient indicia of reliability to introduce the co-defendant's hearsay confession as substantive evidence of defendant's guilt. According to Florida's highest court, neither is it sufficient that the statements interlock on a great many details. As the Florida Supreme Court stated, "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, and the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.[4] *Franqui*, 699 So.2d at 1318. This is consistent with *Idaho v. Wright*, 497 U.S. 805 (1990) (the Court held that admission of child's hearsay statements violated respondent's Confrontation Clause rights where the statement did not fall within a firmly rooted hearsay exception nor was supported by a showing of particularized guarantees of trustworthiness).

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[4] In *Wright*, this court recognized that where hearsay statements do not fall within a firmly rooted exception, they are presumptively unreliable and inadmissible for Confrontation Clause purposes and must be excluded, absent a showing of particularized guarantees of trustworthiness. *Wright*, 497 U.S. 805.

While the STATE contends that admission of DENNIS' confession falls under a firmly rooted hearsay exception for declarations against penal interest and, thus, satisfies the constitutional requirement of reliability mentioned by this Court in *Wright*, the current law in the State of Florida reflects that this exception is *not* firmly rooted. *See Franqui v. State, supra.* Insofar as Florida law does not violate United States constitutional requirements, the Florida Evidence Code is not limited to provisions analogous to the Federal Rules of Evidence. *Burgett v. State of Texas*, 389 U.S. 109 (1967). Accordingly, the question in this case of whether the hearsay exception for statements against penal interest is firmly rooted or not firmly rooted is a state determination that does not constitute a federal question subject to review by this Court.

Contrary to the STATE's suggestion, the Florida Supreme Court is not bound by any of the Federal Circuit Courts of Appeals decisions determining that the exception is firmly rooted, as state courts are clearly authorized to rely on the prescribed rules of their respective state governing the admissiblity of evidence in their own courts, provided they do not deprive any person of his or her constitutional rights. *Id.* Nor is the Florida Supreme Court required to look to other states to determine whether this exception to the hearsay rule is firmly rooted and, thus, sufficiently reliable. It is noteworthy that the STATE's brief advises that it only found eight states concluding that the exception to the hearsay rule for statements against penal interest is firmly rooted, and conceded that eleven states, ruling on the issue, determined that the exception is *not* firmly rooted. (STATE's Petition, pg. 7).

While it may very well be appropriate for this Court to grant review of a federal appeal from a United States Circuit Court of Appeals, since there appears to be a conflict amongst the Circuits as to whether the federal hearsay exception rule for statements against penal interest is firmly rooted, the instant matter is certainly not the right case to do it because it not appropriate to use a *state court decision*, analyzing a *state rule of evidence*, to resolve this conflict, especially where at least twelve states hold that the exception is not firmly rooted.

After determining that the hearsay exception was not firmly rooted in the Florida Evidence Code, the Florida Supreme Court proceeded to examine the totality of the circumstances surrounding the making of the statements in this case to determine whether they were sufficiently reliable to satisfy the Confrontation Clause. Where the initial statements of DENNIS and DOUGLAS about the shooting were inconsistent in material aspects,[5] where there were no eyewitnesses, where there were no joint statements by the defendants, where the statement of DENNIS was likely induced by the suggestions of the officer, where there was no physical corroborating evidence which would indicate the identity of the shooter and where the attorneys' theme at DENNIS and DOUGLAS' joint trial was that the other brother was solely responsible for the murder, the inconsistent statements were properly found by the Florida Supreme Court to be unreliable and, thus, improperly admitted into evidence.

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[5]See Counter-Statement of the Case and Facts, *supra*.

B. There Is No Error Where The Incriminating Hearsay Statement Is Not Sufficiently Reliable To Satisfy The Requirements Of The Sixth Amendment Confrontation Clause.

The admission of the co-defendant's confession implicating the Respondent, DOUGLAS ESCOBAR, in the joint murder trial was critical to the STATE in making its case against DOUGLAS. Since there were no eyewitnesses to the murder, the only evidence of DOUGLAS' involvement in the murder was from the separate statements of DOUGLAS and his brother, DENNIS. Although the STATE is correct that the brothers' purported confessions in this case interlock on *some* details, the statements are not similar with respect to significant details and were not sufficiently reliable to satisfy the requirements of the Sixth Amendment Confrontation Clause as required in *Bruton v. United States,* 391 U.S. 124 (1968).

In *Bruton,* this Court held that a defendant was deprived of his rights under the Confrontation Clause when his co-defendant's incriminating confession was introduced at their joint-trials, even where the jury was instructed to consider that confession only against the co-defendant. This Court noted that not only are these incriminations devastating to the defendant, but their credibility is inevitably suspect, given the motivation to shift blame onto others.

In *Cruz v. New York,* 481 U.S. 186 (1987), this Court, following *Bruton,* held that it was a violation of the Confrontation Clause and error to admit a co-defendant's confession to both his friend and police officers, incriminating the defendant, even though the defendant's own confession to the same friend was admitted against him. The Court further stated, however, that the defendant's confession could be considered at trial in assessing

whether his co-defendant's statements were supported by a sufficient "indicia of reliability" to be directly admissible against him and may be considered on appeal in assessing whether any Confrontation Clause violation was harmless. *Cruz*, 481 U.S. at 194.

As a matter of Florida law, the issue of admissibility of interlocking confessions in a joint trial has been addressed by the Florida Supreme Court. *See Puiatti v. State*, 521 So.2d 1106 (Fla. 1988); *Glock v. Dugger*, 537 So.2d 99 (Fla 1989); *Roundtree v. State*, 546 So.2d 1042 (Fla. 1989). The significant test which the Florida Supreme Court applied in *Puiatti* and *Glock*, in similar fashion to this Court's analysis in *Cruz v. New York*, was the "indicia of reliability" standard. The *Puiatti* and *Glock* cases are distinguishable, however, from *Cruz v. New York*, based on the Florida Supreme Court's ultimate finding of harmless error where the defendants in those two cases not only entered into separate interlocking confessions, but they also subsequently entered into a joint confession resolving all prior inconsistencies. *Glock*, 537 So.2d at 102; *Puiatti*, 521 So.2d 1108.

In *Roundtree*, the Florida Supreme Court found that it was error to admit the interlocking confession of the co-defendant and followed this Court's decisions in *Cruz v. New York*, *supra*, and *Lee v. Illinois*, 476 U.S. 530 (1986). The facts in *Roundtree* are similar to the facts in the case at bar. In *Roundtree*, the case was remanded for new trials, in which the defendant and co-defendant would be tried separately, where the confessions of the co-defendants interlocked on many details, but the discrepancies between the two confessions were significant. *Id.* at 1046. There were no witnesses to the murder and the only evidence of Roundtree's participation (other

than Roundtree's confession) was from the co-defendant's confession. The *Roundtree* court stated, in pertinent part:

> When discrepancies involve material issues such as the roles played by the defendants and whether the crime was premeditated, a co-defendant's confession is not rendered reliable just because it happens to contain facts that interlock with the facts of defendant's statement.

Id. at 1046. As in *Roundtree*, the various statements of DOUGLAS and DENNIS ESCOBAR happen to interlock on details such as how they spent the day together on the day of the murder and how they participated in the theft of a car, but the *material* issues such as the roles played by the defendants in the murder and whether the crime was premeditated or spontaneous are neither interlocking nor reliable.

While the 1990 Amendment to Florida Statute §90.-804(2)(c) may have eliminated the Florida *statutory* prohibition against the admission of a statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, it did not attempt to nor did it affect the requirement, enunciated by this Court and the Florida Supreme Court, that such a statement be supported by sufficient indicia of reliability before it can properly be admitted into evidence.

The Florida Supreme Court's holding in the instant case is also consistent with this Court's opinion in *Lee v. Illinois*, 476 U.S. 530 (1986). In *Lee*, this Court held that a co-defendant's confession, which was given only after he was told that the defendant had already implicated him, was presumptively unreliable and, thus, did

not contain sufficient indicia of reliability flowing from either the circumstances surrounding the confession or the "interlocking" character of the confessions to overcome the presumption against admission of such uncross-examined evidence based on the Sixth Amendment to the United States Constitution.

Since the Florida Supreme Court correctly held that the exception to the hearsay rule for statements against penal interest is not firmly rooted in the Florida Evidence Code, and that DENNIS' statement was not sufficiently reliable to satisfy the minimum requirements of the Sixth Amendment Confrontation Clause, this Court should deny the writ.

C. The Statements Are Not Substantially Reliable Where They Are Induced And Overheard By Only One Single Spanish Speaking Officer.

The only evidence as to the role played by DOUGLAS in the shooting in his statement to the co-defendant to "shoot him" was recounted in two conflicting versions by Detective Morin, the only person to have overheard the purported confessions.

After unsuccessful attempts to elicit information from DENNIS, Detective Morin told DENNIS that both DENNIS' wife and DOUGLAS had given him information about who shot the policeman. To further induce DENNIS to give a statement, Detective Morin tried to convince DENNIS that DOUGLAS had given a statement. Then, the detective offered fact-specific different versions of what happened to DENNIS, and DENNIS merely adopted the second version – that DOUGLAS told DENNIS "if he gets out shoot him." (p. 31a).

Thus, DENNIS merely adopted one of the detective's stories after being told DOUGLAS had already agreed to

it and after being told that his wife was in custody and that if no family members were found to care for the children the Department of Health and Rehabilitative Services would take his children away. (pp. 2a, 35a-50a). It is also noteworthy for the purpose of determining reliability and trustworthiness of these purported confessions, that DENNIS' statement to Morin was given in Spanish outside the presence of any other Spanish speaking person, without any independent corroboration. Based on these facts, the circumstances surrounding the making of these statements were not totally reliable and, thus, not sufficient to withstand the Constitutional Confrontation Clause requirement that the statement ring of reliability and trustworthiness.

D. There Is No Error Where The Co-Defendant's Statement Is Not Truly Self-Inculpatory.

The STATE's reliance on *Williamson v. United States*, 512 U.S. 594 (1994) is misplaced. In *Williamson*, this Court stated that "[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor." *Williamson*, 512 U.S. at 603. Thus, a co-defendant's individual, self-incriminating statement must focus on his *own* actions to be admissible.

Williamson is not applicable to the case at bar where DENNIS' alleged confession lacked the particularized guarantees of trustworthiness that the *Williamson* Court claimed existed in "truly self-inculpatory" admissions that were not made "to shift blame or curry favor." *Id.* The confession in the instant case was inherently unreliable and not truly self-inculpatroy based on the material discrepancies shown in the different versions received by the officers and based on the tenor of DENNIS' confes-

sion reflecting his desire to point the finger at his brother as the one who conceived of committing the shooting and who ordered his brother to shoot the officer.

E. The Error In Admitting Inadmissible Hearsay Statements Cannot Be Deemed Harmless.

With respect to the STATE's harmless error argument, the error committed by the trial court in admitting the non-testifying co-defendant's statement cannot be deemed harmless where the record did not consist of joint statements, the individual statements were inconsistent in material aspects, the confession was clearly prodded out of DENNIS who ultimately only adopted the version offered by the officer, there was no physical corroborating evidence and there were no eyewitnesses.

In view of the inherent problems that exist with respect to the inculpatory statements at issue, this case is clearly not appropriate for review by this Court. (See Subsection C, pg. 11). There is ample law written regarding the admission of a non-testifying co-defendant's incriminatory statements under the hearsay exception for statement against penal interest which states that if the statement falls within a "firmly rooted" hearsay exception or if the statement had particular guarantees of trustworthiness shown from the totality of the circumstances, the statements would be sufficiently reliable to withstand Confrontation Clause problems. Nothing special or novel exists in this case that warrants this Court's discretionary review. Under the authority bestowed upon states to establish and alter rules of evidence, subject to constitutional limitations, the State of Florida could, and did, properly find that the hearsay exception for statements against penal interest was not firmly rooted in the Florida Rules of Evidence and, accordingly,

such statements are presumptively unreliable and inadmissible for Confrontation Clause purposes. *Lee v. Illinois, supra.* Furthermore, any additional clarification of "particularized guarantees of trustworthiness", that which must be shown from the totality of the circumstances to determine the reliability of the statement for Confrontation Clause purposes, is highly unlikely as these factors depend on the facts and circumstances of each particular case.

F. There Is A Strong Likelihood of The Case Being Reversed On Other Grounds.

Finally, even if this Court were to grant the STATE's Petition for Writ of Certiorari, there is a strong likelihood that this case will be reversed, anyway, on other grounds which the Florida Supreme Court addressed in its decision granting a new trial.[6] The trial court erroneously admitted similar fact evidence, known in Florida as *Williams* rule evidence,[7] concerning DOUGLAS' attempted first-degree murder conviction for shooting a California Highway Patrol trooper and other incidents of violence. The Florida Supreme Court found that

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[6] Although the Florida Supreme Court expressly reversed Douglas' convictions and sentences on the basis of the error in admitting into evidence incriminating portions of the co-defendant's out-of-court statement, it also found error in another evidentiary issue, detailed in its opinion, which leads to the inexplicable conclusion that this case will be reversed for a new trial, regardless of the outcome before this Court. *Escobar v. State*, 699 So.2d 988, 992 (Fla. 1997).

[7] In *Williams v. State*, 110 So.2d 654 (Fla. 1959), the Court held that similar fact evidence, such as testimony concerning a collateral crime, is not admissible if it goes only to show a defendant's bad character or propensity. *Id.* at 662. *Williams* has been codified as section 90.404(2)(a), Florida Statutes (1989), and is commonly known as the *Williams* rule.

there was not a sufficient evidentiary nexus in the record of the trial to have permitted the jury in this case to reasonably infer that DOUGLAS' other crimes or bad conduct was related to the murder in this case. Thus, the Court concluded that the evidence of other crimes was, for the most part, inadmissible.

In view of the obvious potential for reversal on other grounds, the instant case will likely be retried regardless of this Court's disposition and, thus, this Court's review of the present case will not have a significant impact on the outcome of this case. Therefore, the only true effect of granting review in this case will be its precedential value, which is an insufficient basis for granting review since it takes on the appearance of an advisory opinion.

CONCLUSION

Based on the foregoing arguments and authorities, the petition should be denied.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Case No. 89-11887-B

Circuit Court Of
The Eleventh Judicial Circuit Of Florida
– DADE COUNTY –

* * *

[758] from the main building.

When we reached there, as we were signing out of the prison one of the guards there at the desk told us that he had just received a phone call from the medical ward that Dennis Escobar had changed his mind and that he wanted to speak to us again.

Q So, did you return there?

A Yes. We did walk back up to the medical ward.

Q How much time actually transpired between the time you left and returned to him?

A It was a total of 15 minutes because it's a seven, eight minute walk from one way from the medical building to the front of the prison.

Q And when you arrived back in the presence of Douglas Escobar, what occured?

A He started questioning Roberson and I but mainly he was speaking to me in Spanish and his questions were as to what his brother had told us and to what his wife had told us regarding Officer Estafan's homicide.

And I explained to him that his wife had gone to the extent that telling us on the night that Officer Estefan

was killed he came home. He arrived home and she was in the bedroom. He approached her

* * *

[806] A I don't recall exactly who wrote that.

Q All right. You don't know if it was Detective Morin or the defendant who actually put that on the form?

A I don't recall who wrote it.

Q Okay. After that form had been presented and signed by the defendant, what happened?

A At that time, Detective Morin began to interview the defendant about an incident that occurred in Miami.

Q And did the defendant say anything or do anything?

A The defendant became upset that Detective Morin was asking him about that and wanted to know how he had come about this information.

Q And how did Detective Morin respond to that?

A He said that the investigation they had conducted had focused on him and at which time he said, told him that we had been in contact with several people who had provided information.

Dennis then said that he felt Detective Morin was trying to involve him in something that he was not involved in and he did not want to talk about that incident.

* * *

[847] A Then they again spoke to me reference the Miami case and I again repeated that I did not know anything about what they were saying to me.

They told me that they already knew everything because my wife was detained. She was in hail and she had told them everything.

Q Who told you that?

A The Detective Morin.

Q Go ahead.

A And that if I did not speak and plead guilty, my wife was going to be given five years of prison for using her as and instrument of the crime. And that my children had been taken away and that if I did not plead guilty they were going to be taken away.

Q Did you believe that?

A And so I believed him.

Q Well, did you ask to speak with your wife or your children?

A Yes. I asked to let me make a phone call to see if it was true what he was saying. And he repeated again that until I plead guilty he was not going to let me do the phone call.

Q So what happened?

A And then I told him how could I plead guilty of something that I had not done.

* * *

[886] case in existance at that time?

A No, I did not.

Q All right. Have you read the rights and you indicated he was willing to talk to you. What occurred?

A He would fall asleep and then we would wake up. We would talk a while. He would make some spontaneous statement every now and then.

Q And what kind of statement did he tell you or what questions did you ask and what was his responses to those questions?

A He made a statement and if I can refer to my notes I'll quote it as.

THE COURT: Make can reference now to the—

MR. BAND: To the police report.

THE WITNESS: My police report.

At 5:50 a.m. on the 28th, Mr. Escobar stated, quote, "I killed a policeman in Miami. California was looking for me. So I went to Florida. I was driving with no license. They pulled me over and drew their gun on me, start to shoot. So, I killed an officer."

* * *

[927] Q All right. Before we go into how he responds to that I would like to explore the issue.

You weren't entirely genuine with Mr. Douglas Escobar concerning certain information; is that correct?

A That is correct.

Q That is, you had not spoken to his brother Dennis at that point; is that correct? Or you had spoken to him but actually had not illicited a statement from him?

A Yes.

Q What about the car?

A I was really not authentic about the car but I had information of the car from Gilberto Seballos who we had spoken to earlier and that's where the information of the car came about.

The car was not in our possession at the time and neither did we have a fingerprint located on the gas cap of the car.

Q After you suggested these things to Douglas what occurred?

A He made several comments. The first comment that he made that led me to believe that he was going to

cooperate or give a statement regarding this incident was when he said, "I am not a killer."

[928] And I continued that by telling him—

Q He said, "I am not a killer." Or "I am not a cop killer."?

A At that point he said, "I am not a killer." I believe was all he said.

And I told him, "I realize you are not a killer. You know, I know that you didn't pull the trigger. I know that you didn't fire the shot that killed the officer. That your brother did. He told us he did." But that regardless that he was there and we have to be truthful and he would have to tell us what happened. And that he would eventually have to answer for his actions.

We explained to him what we were talking to him about was a very serious matter.

Q And how did he respond?

A He said after that he said he had no motives or reasons. He said that he was only a car thief.

And then I went onto say to him that any time a police officer gets killed it turns into an investigation of great magnitude. That a lot of people get involved.

I explained to him that we had done our homework. That we had not travelled all the way to California to ask him whether or not he had or had not [929] killed a police officer. Rather that we knew he had been involved in the incident and we only needed to hear from him what the reasons were, why they had done it.

Q And how did he respond?

A Again, he responded by saying, "I am not a murderer."

And again I explained to him that I realized he was not a murderer. That his brother was the one that actually fired the shots but that we needed to hear from him at

least several facts whereas he could tell us things that we could verify and we would know he was being truthful to us or with us to a certain extent.

Q And what did he tell you?

A Well, I went up to tell him, I gave him an example. I said one of the ways you can verify some of those facts is to tell us where was the place that they had left the car and he told me that he was not familiar with the Miami area but he knew at that car had been left in a parking lot which was very close to his brother's area in an apartment parking lot on 7th street.

I then asked him where was the place that he had taken the car to get it washed because we had [930] learned from Gilberto about the car being washed. He tried to erase the prints and he told us that he had taken the car the day after the shooting of Officer Estefan he had taken the car to a car wash which was right next to the Los Peblos marked on Northwest 7 street and he indicated that that was not very far from his brother's house either.

At that point I explained to Douglas that I believed he was being about 80 percent truthful with us but that we needed to hear a little bit more.

I told him I realized what he had told us was true because it was corroborated by Gilberto and by his brother Dennis and then I told him what I needed was I needed to hear the truth from him about the entire incident.

And then he proceeded to question us as to what Dennis, his brother had old us or the information we had from Dennis.

And it was explained to him at that time that it would not be wise for us to tell him what Dennis had told him because we already had Dennis' version. We did not want him to hear or for him to repeat what Dennis had said.

Rather we wanted to hear his version of the events. If he told us something inconsistent from what we knew from Dennis therefore

* * *

[940] is as we were walking out he requested that I come back and he called for me specifically. He asked me to come back in the room.

Q How did he do that?

A He called my name.

Q Detective Morin?

A Detective Morin and he asked what his, again he wanted to know what his brother had told us.

Q And what did you respond?

A I responded to him I would tell him at a later time exactly what his brother had told us but first we wanted to obtain his statement from his.

Q All right. Did you then leave the hospital?

A Yes.

Q All right. And did you return sometime that evening?

A Yes, sir.

Q About what time?

A At about 6:00 p.m.

Q Prior to that did you stop by and pick up the magazines he requested?

A Yes, we did.

Q And who was with you on this trip to the hospital?

A Detective Roberson was.

* * *

[945] That he knew that he was guilty. He was guilty of what he had done in California and guilty about what he had done in Miami but he a wanted to get the eighty

thousand dollars to his family and if we can get his family the eighty thousand dollars he would give a statement.

Q And how did you respond to that?

A We told him that that was impossible. That under no conditions would we be able to give him or reward him or his family for killing one of our police officers and then he proceeded to ask about how much time he would get and where he would serve his time if he was convicted of these crimes in California and Florida.

Detective Roberson explained to him that if he was found guilty of in California he would then be tried in Florida and should he be found guilty in Florida that more than likely his sentence would be served in Florida and he told Detective Roberson that he wanted his, if he was to serve his time in Florida that he wanted his wife and his child to come to Florida, not to say in San Luis.

Detective Roberson told him there was no way he could promise him anything. He could not promise him the reward. He could not promise the relocation

* * *

[948] Q And how long did the earlier interview last?

A 45 minutes or so.

Q Was there any difference in his physical condition between the early interview and this later interview?

A No.

Q Did he at the later interview, did he complain of any pain or discomfort?

A No.

Q Did he appear to you to be under the influence of any medication?

A No.

Q Did he answer your questions or were his answers responsive to the questions you asked?

A Yes.

Q Yes, they were.

Q Were they clear?

Q In English?

A Yes.

Q Did you—when you concluded—was this the conclusion of your interview at this time then of Mr. Douglas Escobar?

A Yes. Accept for before we left he asked me to explained to him what his brother had told him and I basically gave him a synopsis of obviously [949] information that I wanted him to believe that I had but I really did not have at that particular point.

Q After that was finished, that is, you telling him what he thought his brother had told you, what occurred? Did you leave the room?

A Yes, I did.

Q When you were leaving the room were there other officers waiting to interview Mr. Escobar?

A Yes.

Q And what officers were they?

A Roman Finale from the highway patrol in California and Manny Barrasa from the Pasa Robos police department.

Q And did they go in to interview Mr. Douglas when you had finished?

A Yes, they did.

Q Do you know how long they were in there?

A Probably a little over an hour.

Q Did you see them when they finished?

A Yes, I did.

Q When they finished did you go back into the room to speak to Douglas about anything?

A I did. While they were in there I had made a phone call back to our office and we spoke to our lieutenant and told him basically what Douglas had

* * *

[1069] A Yes, it is.

Q And when does that begin to be administered?

A The first notation in the ICU notes of administration of Morphine to Mr. Escobar is at 0900 hours on 4-27-88.

Q What is 0900 hours?

A 9 a.m.

Q And is that close to or approximate in time as to when he got in surgery?

A He got out of surgery and was received in the ICU just before 8 a.m.

Q How much or what is the dosage of Morphine and what type of Morphine is it. If you can tell me?

A Well, it's the the immediate acting form of injectible Morphine called Morphinesulfate.

He received a dose of two milligrams which is given, it says IVP which means IV-push.

Injectible Morphine is usually given directly into the intravenous line with a syringe over a slow IV-push over a period of four to five minutes.

Q And what is the next instance when he was given Morphinesulfate?

A The next dosage occurs 40 minutes later at 9:40 a.m.

Q We are on the 27th of April now?

[1070] A Of April. At that he received four milligrams of Morphinesulfate again. Slow IV-push and the nurses indicated in both cases that it was being given for pain.

Q What is the next instance?

A The next it occurred one hour later at 10:40 a.m. The nurse indicates that he received another four milligrams Morphinesulfate intravenously.

Q Generally speaking, more specifically if you would like, does the administration of Morphine happen at regular intervals for the next several days?

A It does. He receives Morphine more or less regularly every hour. In some cases as long as two hours.

Initially 4-27, each time intravenously, directly in the intravenous line throughout the day on the 27th.

He received on most occasions two milligrams. On a few occasions, well, actually, it's about half and half. Two milligrams to four milligrams intravenously every, pretty much every hour.

Q Okay. A nurse is doing this at a doctor's instructions?

A At Dr. Henry's order.

[1071] Q Dr. Henry is the—

A Is the treating, the surgeon who has primary authority for Mr. Escobar's treatment.

Q Now, is there an increase in dosage you detect from reading those notes?

A Yes.

Q During the periods of time you have in front of you?

A Yes. On 4-27 at 16:20 the dosage of Morphine was increased to six milligrams intravenously.

Q And specifically what time was that?

A 16:20.

THE COURT: That means 4:20 in the afternoon.

MR. COHN: Thank you.

THE WITNESS: Most medical reports are given in 24 hour time.

BY MR. COHN:

Q And up until this particular time when he received

six milligrams of Morphine, is there any other drug that you detect he's being given. For instance, Demarol, Valium, Percodan, anything at all?

A He was not being given Demarol, Valium or Percodan. He was receiving antibiotics intravenously. [1072] Mostly for prophylactic prevention of infection in the multiple wounds that he had. He did occasionally receive oral Tylenol for fever.

Q When did that begin?

A The order was written at the time of surgery. The first dose he received was at 16:30 on 4-27.

Q Now, are there other notations which indicate his generally condition. For instance, bowel sounds, stomach dystension, pneumonia, things like that?

A On the—are we still talking about the 27th?

Q Yes.

A On the 27th he seemed to be having what one would consider, what one would consider to be a fairly normal post operative given the extent and the severity of his injuries. Fairly routine post operative course on the 27th.

Q And then on the 28th?

A On the 28th he began having problems with abdominal dystension, the abdomin getting distended, rigid, decreased bowel sounds indicating some decreased mobility of the bowel and intestines.

On the 28th also was was the first notation [1073] of decreased breath sounds.

Q An the 28th?

A On the 28th, yes.

And he was continuing to receive injections of Morphine intravenously every one to two hours.

Q Now, is someone given Morphine because they complain of pain or is it because a doctor tells someone

that, tells a nurse that you better start giving him Morphine for a particular reason?

A No. The Morphine order was not written as a regular order by Dr. Henry to be given at a certain fixed time. The Morphine order was written, what we call PRN or in other words when the patient requires it and it was given. Dr. Henry wrote that the medication was to be given as needed for pain.

Q In other words, if a nurse saw or observed that someone was in pain that they would come in and they would administer or put in some Morphinesulfate; is that correct?

A That's correct.

Q Now, what is a half life or what is the description half life of a particular drug? What does that many?

A The half life of a drug refers to basically it's a time interval you would say the half life of a [1074] drug is one hour or two hours. That means that after the initial administration of that drug that if the half life is two hours say that two hours later half of the initial dose of the drug will still be in the patients system at that time.

Q Would that mean that there is a cumulative effect from the drugs that have been administered or the Morphine in this case that was administered to this particular individual as the days progressed?

A Yes. The half life of Morphine which is the drug we are talking about in this days is 1.5 to 2 hours and he was frequently given medications at more frequent intervals than one and a half two hours. Meaning that when he got the next dose of medication, still at least half, if not more, of the medication that he was previously given was still present.

Q Up until this point we are at the 28th. We didn't go any further than that. Would you consider the amount of

Morphine he was receiving a small dosage, a large dosage, medium dosage? How would you describe it?

MR. BAND: Objection. I don't think there's a basis other than to base it upon as what a psychiatrist physician. What's the basis?

THE COURT: Sustained.

* * *

[1094] A In fact, his condition appeared to deteriorate throughout the day and by 6 p.m. or 6:30 when he was we interviewed he was beginning to express bizarre material and act in an overtly bizarre manner.

Q Okay. Doctor, given the dosages of Morphine that you have seen in this particular case with Douglas Escobar, can you tell me whether or not he is someone who would be susceptible to suggestion. That is, easily manipulated?

A Yes. I believe Douglas Escobar or anyone who had received massive doses of narcotic mind altering medications that he had received would be again not fully in control of their mental faculties and could be open to suggestion.

Q In other words, if someone came into his hospital room, had a clear mind and had an objective or a goal and they were easily or wanted to suggest something to him or wanted him to do something, he probably would do what they wanted?

A I think he certainly could do what he or anyone with under the influence of that much medication could certainly do so.

A Now, the questions that I have asked you about the fact that these Miranda rights were given to Mr. Escobar, you stated to us and you have stated to [1095] the Court very clearly that you felt he was not able to comprehend. What do you base that on?

A On the large, extremely large doses of narcotic medication that he was given. One of the specific effects of which is to cause mental confusion, drowsiness, apathy.

The very, very, poor, poor medical condition that he was in, anyone, even someone not under the influence of the massive doses of narcotics under which he was of the influence but who suffered from the critical types of injuries that he had would would not be at their peek mental state.

Just by nature of the physical condition. And then you put, so you got two things. Well, you got two things. So far, you got his poor medical condition to begin with. Critical medical condition to begin with, was not sure he was going to survive.

You got the massive doses of narcotics he was being given and then you have the fact that he was developing a raging pneumonia. He was developing complications from the arterial blood oxygen was dropping drastically throughout the day and night of the 30th.

The brain. The fuel of the brain, if you will, is oxygen. That is what the brain works on. If

* * *

[1124] in charge of his primary care while he stayed at the Twin Cities Hospital at Templeton?

A Yes.

MR. GALANTER: Do you want to make out through his qualifications?

BY MR. GALANTER:

Q And, Doctor, as a result of those injuries, were you required to perform some surgical procedures on Douglas Escobar.

A Yes. Within an hour of admission I took him to the operating room and under general anesthesia we did a an exploratory laparotomy repairing the gunshot damage to his diaphram, liver, stomach, small intestine. Urulogy helped me and we took out his left kidney. An orthopedic surgeon did the injury to his left mid forearm.

Q Okay. And happened after surgery? Was he admitted to the intensive care unit at the hospital?

A Yes, he was. He had a very complicated post operative course in that he had major injuries as stated above and required a lot of antibiotics, intensive respiratory therapy, pain medications and after he had been there about his second or third day it appeared to me, clinically he was going through delirium tremens.

[1125] Q Which is what?

A Withdrawal of alcohol and becoming very disoriented and irrational, and I had to sedate him with Valiums. It did resolve from this.

Q Now, Doctor, we have all of the medical reports and I notice from almost an hour or two after he got out of surgery you had prescribed Morphinesulfate; is that correct?

A Yes.

Q Can you tell me at what dosage levels you gave Mr. Escobar Morphinesulfate?

A I can't remember the exact dose. I don't have the nurse's records for that. But it was significant in that he required it every hour or two.

Q Okay. Doctor, did, do you recall whether or not the levels of Morphine you prescribed for him increased or decreased or stayed the same during his stay at the hospital?

A He took a great deal. Initially low levels that we gave him when he first came out of the operating room

weren't adequate and he required higher doses and more frequently.

Q Okay. Now, do you have your medical records in front of you?

A Yes.

* * *

[1129] frequently.

Q Is that the type of dosage or narcotic that would cause someone not to understand what was being said to them?

A Depending on the person. You could give a person two milligrams of Morphine which is a fairly low dose and then it can put some people all the way to sleep. It depends on the individuality of the patient. His age. The status of his internal organs and whether he has any prior use of narcotics before you use them to the greater tolerance you have and the larger dose you are required.

Q Okay. Now, on April the 30th he had been receiving Morphine for approximately three or four days; is that correct?

A Yes. He started receiving Morphine 4-27-88.

Q Okay. Now, being Mr. Escobar's primary care physician, do you have an opinion based on a degree of reasonable medical certainty whether or not specifically Mr. Escobar could have understood on April the 30th, 1988 anything that was being said to him?

A He might have appeared to be understanding but the usual actions of the Morphine that he was receiving could really effect his particularly his

* * *

[1146] you recall, on April the 30th, did he have something called a a vacuum tube coming out of his chest?

A Oh, it's called a chest tube or a chest thoracostomy tube. Yes. He had that out of his chest put out the night of the surgery and taken out 5-2-88.

Q And also, did he have a catheter tube in his bladder or penis?

A Yes.

Q And those would have been visible to anybody who walked into the hospital room?

A No. Basically he's covered with a sheet. I don't think you would see them unless the sheet was pulled down.

Q But does the drainage tube drain to something that's on the floor?

A Yes. Like a vacuum pump on the floor. Yes.

Q And the urine pack would be hanging on the side?

A The edge of the bed.

Q Hanging on the side of the bed?

A Yes.

Q And did he also have oxygen in his nostrils?

A Yes.

Q As well as IV tubes in his arm?

A Yes.

[1147] Q Okay. Overall, Doctor, would you say that he was near death during the time that you were treating him?

A The term people are used to, yes. He was in a critical state.

Q And that would apply to his medical and physical status on April the 30th as well; is that correct?

A Correct.

Q Thank you, Doctor?

THE COURT: Mr. Band, anything more?

THE BAND: No, Your Honor.

THE COURT: Doctor, thank you very much. Have a nice day.

(witness hung up)

THE COURT: You want to do the nurse?

MR. GALANTER: Yeah. What is her name, Michael.

MR. BAND: Diana Dyer.

THE COURT: The number.

MR. BAND: 805-543-5353. Now, that's the hospital. So she is working.

THE COURT: Okay.

MR. BAND: So, we are going to have to ask for supervisor nurse and she is the supervisor.

* * *

[1229] Men's Colony.

The only testimony presented concerning this statement shows that the defendant was lucid, alert and appeared to understand what was going on. He was given Miranda warnings and this Court concludes that the statement was freely and voluntarily given and that defendant knowingly and intelligently waived his Miranda rights.

The motion to suppress these statements also denied.

The fourth statement, the one of May 28th, of 1988 must be considered by the Court in a manner similar to the May 3rd statement.

While the defendant may have been tired, there is no testimony that he did not understand the Miranda warnings or that he did not have the capacity to understand them.

The Court concludes that the defendant's statements were freely and voluntarily made after knowingly and intelligently waiving his Miranda rights.

The motion to suppress these statements is likewise denied.

At this time I want to go back to the William's rule motion.

[1230] I have considered the argument of counsel, both counsel with regard to the William's rule testimony proffered by state.

While the court is familiar with the case law regarding the scope of William's rule testimony having been educated by Mr. Mendelson previously in the William's case. William's 72 or whatever that is. There are a lot of Williams cases.

The Court does not believe that the testimony which the state is seeking to illicit and present to this Court regarding the situation in California falls within the ambid of that rule.

Based upon this Court's consideration, the Court will, with due respect, deny the state's motion to allow William's rule evidence regarding the California situation.

MR. MENDELSON: Your Honor, is there a written order?

THE COURT: No. I don't have a written order on it.

MR. MENDELSON: May we just ask for one?

Judge, if you can clarify that. Does that also refer to—that just refers to the California shoot out? That doesn't —as to our

* * *

[5128] THEREUPON:

DETECTIVE GEORGE MORIN

was called as a witness on behalf of the State, and having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LAESER:

Q. Good morning, detective.

A. Good morning, Mr. Laeser.

Q. Could you tell the ladies and gentlemen of the jury your name and where you work, please?

A. My name is George Morin, and I work with the City of Miami Police Department.

Q. And how long have you been working with that department, sir?

A. Since May of 1978.

Q. At the beginning of your work as a law enforcement officer, did you receive any particular type of training before you were sworn in?

A. I went through the standard police academy which is approximately six months and then through the field training officers program.

Q. What is a field training officer? How would that differ from other type of officer?

A. Field training officer is a person who trains

* * *

[5179] 8:34 p.m. is that an accurate reflection of the actual date and time that that procedure occurs?

A. Yes, sir.

Q. Okay. Have a seat, please.

Once you get through that physical procedure by that I mean going through the rights form and having him initial it and everything else, did you have any discussion with the defendant, by that I mean Dennis Escobar, as to whether or not he wanted to talk about the Miami case?

A. Yes, I did.

Q. What was his response at that point?

A. His response was that he would talk to the California authorities about their case, but he did not want to talk at all about the Miami case at that particular time.

Q. I want to sort of break that sentence down.

Did he say specifically he never wanted to talk about the Miami case or did he include the phrase at that time?

A. He included at that time in that phrase.

Q. Did you honor his request at that time in terms of not questioning him about the Miami case?

A. I did.

* * *

[5191] reading?

THE COURT: What are you reading from?

THE WITNESS: At this point I am looking down to attempt to find a different area.

THE COURT: These are your notes?

THE WITNESS: Yes, sir.

THE COURT: Overrule the objection.

MR. CARTER: Have you provided a copy of those notes?

THE COURT: You have all the reports. I think you were given all the reports, weren't you?

MR. CARTER: I don't have the copies of notes I don't believe.

THE COURT: Are you using notes?

THE WITNESS: These are the notes of the interview with Douglas Escobar that were made.

THE COURT: Were all those furnished?

MR. LAESER: Yes, sir.

THE COURT: Overrule the objection. You may proceed.

MR. LAESER: I have another set here.

THE WITNESS: And I further told him that his brother had gone as far as to tell us that he is the one that had fired the shot and that he Douglas had not fired the shot at all.

* * *

[5198] that he makes copies for defense counsel.

THE COURT: That's fine.

MR. LAESER: If you can mark these three items for identification.

THE COURT: The items that you are making reference to, they are part of the report.

THE WITNESS: That is the California portion and it is part of the supplemental report.

THE COURT: And these things that everybody has referred to, copies were given to Mr. Carter? Yes?

MR. CARTER: Yes.

THE COURT: You may proceed, Mr. Laeser.

BY MR. LAESER:

Q. Let's go to the point where we had broken which was that you had just completed transmitting certain information to the defendant, Douglas Escobar. You recall at one point whether or not there was a response by Douglas Escobar to the facts, the circumstances, that you were laying out for him in terms of what you believed you knew?

A. Yes, there was.

Q. What was his response?

A. He told us he was not a murderer.

Q. And how did you react to his statement that [5199] he was not the murderer?

A. I told him I know you are not a murderer. I know that you didn't fire a single shot, your brother fired the shot, but I need to hear from you exactly what happened.

Q. Did you respond to that line of statements?

A. Yes, told him regardless that he was there, that he would have to be truthful with us and he would have to answer for what his actions were.

Q. Did you give him any information as to whether

or not you might have had possession of the Mazda automobile?

A. Yes.

Q. What information did you tell him?

A. I told him that we, in fact, did have the Mazda, that it was in our custody in Miami and that, in fact, his fingerprints had been found on the gas cap of that Mazda.

Q. Did you try to determine from Douglas Escobar where the car had last been left?

A. Yes.

* * *

[5201] Q. Up to that point, did you know that information?

A. No, sir.

Q. Did you tell him during the course of that conversation that you believed him to be entirely truthful, partially truthful?

A. I told him that I believed he was coming along and that he was getting at the truth, but he wasn't truthful with us 100 percent at that particular time.

Q. Do you remember whether or not during the course of this particular interrogation, Douglas Escobar tried to find out specifically what information Dennis Escobar had told you and the other investigators?

A. I am sorry. I missed your question.

Q. Let's just take this interrogation. You are interrogating Douglas Escobar.

Does he ask you, does he try and pump you with information as to what his brother Dennis might have told the police?

A. Yes, he does.

Q. And do you tell him anything about what his brother told you?

A. I told him that it would be impossible at [5202] that time, at that point for us to tell him what his brother had said because that would be very easy for him to repeat what we had told him.

I told him that – just based on what I told him, he knew that we had, in fact, spoken to his brother, that we did, in fact, speak to his brother and that I wanted a truthful statement from him.

Q. At some point is there an emotional change? Do you see something take place or hear something take place that tells you that his mood had changed in some way?

A. Yes.

Q. What takes place?

A. I was able to notice a slight watering of his eyes.

Q. Did he say anything or do anything at the time that his eyes watered?

A. Yes, he did.

Q. What did he say or do?

A. He immediately said that it was not his fault.

Q. Did he explain what he meant by not his fault?

A. He said that it was the fault of the American Justice System, and we encouraged him to see what he

* * *

[5222] so it can be presented, considered or heard by anybody. It would be a way of preserving his statement.

Q. When you tell him that you want to record his statement, does he express to you in any way why it might be perhaps difficult or he might be hesitant for allowing you to record it?

A. He tells us it was a very hard thing to tell on yourself.

Q. Are you certain he said that? Did he say tell on yourself or tell on your brother or tell on somebody else?

A. No, he said tell on yourself.

A. At some point during the beginning of this second session, is there a discussion about the existence of a reward for the person or persons involved in the homicide of Officer Estefan?

A. Yes, there is.

Q. How does that first come up? How was that first mentioned?

A. He questioned if there was an award in a very positive manner as if knowing that there is one, just wanted to be reaffirmed or reassured of the fact that one did exist.

* * *

[5226] to keep the recorder going. Whatever he had to say to please say because it had to be recorded, but he was insistent on it being stopped and it was, in fact, stopped.

Q. Did you make a second try within a matter of moments just to start the recorder again?

A. Yes.

Q. And did you continue with that second recording?

A. Yes, for several minutes or for under a minute, I'm sorry.

Q. What caused the second recording tobe stopped?

A. He again requested that we stop the recorder.

Q. Did he at anytime tell you why it was that he wanted the recorder stopped?

A. He then told us that it was a very hard thing to tell on yourself and that he couldn't do it.

Q. In other words that he personally at this point had decided not to go ahead?

MR. CARTER: In other words. I object to that, your Honor. He is testifying.

THE COURT: Just say object and I'll sustain the objection.

* * *

[5238] the answers but what we needed from him were the reasons or the motives why things had occurred how they did.

Q. When you give him, when you throw all that. I have spoken to Douglas, Fatima, we have the information already, we just want you to tell us why, did he respond in some way?

Did he give you an answer back as to whether or not he could immediately go ahead and speak to you?

A. He didn't give any indicate that he would speak to us at that point.

Q. Early in this meeting, did the phrase or did the words electric chair come up?

A. Yes.

Q. I want you to explain to the jurors the context in which it came up, who spoke them and specifically what was said?

MR. CARTER: Objection, your Honor.

THE COURT: Objection is made at this time and for the reasons previously stated the objection is overruled.

You may proceed.

* * *

[5241] bedroom and that Dennis had told her–

MR. CARTER: Objection.

BY MR. LAESER:

Q. Please don't tell me what the conversation between Mr. and Mrs. Escobar was at that time, but did you relate information that you had concerning that at that point?

A. Yes.

Q. Did you give him any additional information as to what his brother, Douglas, had already told you at that time?

A. Yes. I told him that Douglas in his statement to us had told us that he was the one who had told Dennis to shoot.

Q. After you conveyed this information to Dennis Escobar, does he start to give you some information or some things that he wants to tell you?

A. Yes.

Dennis told me, he said, all right, I'll tell you exactly what happened and he proceeded to say that on the evening of Officer Estefan's murder, he and his wife were home alone, that Douglas came into the house and he told him that he had just shot a policeman.

Q. Based upon all the information gathered up until that point, did you believe that what he was [5242] telling you then was truthful?

MR. CARTER: Objection as to what he believed.

THE WITNESS: No.

THE COURT: Overruled.

THE WITNESS: No, I did not and what I did, I immediately cut him off.

I told him, I thought when we came back up here to the room that you were going to be truthful to us, that

you were going to tell us the truth, but this is a lie. Obviously, I don't want to listen to a lie and I told him, I'm leaving. If you want, if you want to tell us the truth, I will be more than happy to come back and Roberson and I then walked out of his room again and proceeded to walk out of the compound.

BY MR. LAESER:

Q. In terms of how you expressed your feelings about this being a lie, you've expressed it one way in the courtroom.

Were you angry? Were you telling him in a sort of angry tone that you thought he was lying to you?

A. No.

* * *

[5245] MR. CARTER: Object.

THE COURT: Sustained.

BY MR. LAESER:

Q. What was it that you thought at that time and expressed to Dennis Escobar was taking place?

A. I told Dennis that the information I had was that his wife was assisting and cooperating with the investigators in Miami.

Q. Did he make some sort of response to you concerning his wife?

A. He told me that if we left her alone, if we left his wife alone, that he would tell us all we wanted to know.

Q. Did you in any way indicate by way of a promise or an agreement that you would go easy on his wife or anything like that in order to get a statement?

A. No. I told Dennis that I didn't know the degree of his wife's involvement in the crime or in the murder of the police officer, and if she had, in fact, committed a

crime, she would have to deal with it with the Miami authorities but that I could not guarantee him what was going to happen.

* * *

[5256] directly after the interview with Douglas Escobar.

Q. Let me ask you some questions about that note pad before we go too far into it.

Could you look at the back of the note pad and just verbally without showing it to anybody describe what is shown on the back of that note pad?

A. Originally when I had spoken to Douglas Escobar I was trying to pinpoint a location to where they had left the Mazda used in the shooting and I drew, hand drew, freehand drew a sketch of the general area of where Dennis Escobar lived in an attempt to have Douglas more or less pinpoint to us where the Mazda was left.

Q. And the information that's on there concerning the streets and the direction from any location where you could actually find the Mazda, where did that information come from?

A. It came as a result of the conversation that I had with Douglas.

Q. In terms of what you tried to do concerning convincing Dennis Escobar that his brother, Douglas, had actually given a statement, when you wrote down the statement, did you write it down in English or Spanish?

A. I wrote it in English.

[5257] Q. What did you do in order to try to make certain that the words that you had written down in English would be conveyed back in Spanish to Dennis Escobar?

A. I brought in Officer Phil Palma who is a corrections officer with the State of California. He was a per-

son in charge of guarding Dennis while he was in the hospital wing of the prison and I asked Officer Palma to proceed reading to Dennis from this note pad translating from English to Spanish what was written down on that pad.

Q. In terms of the procedures that were involved, did you leave the building entirely? Did you stay close? What was involved there?

A. No. I asked Officer Palma to walk in the room. He was outside sitting in a chair by a door. I asked him to walk in the room, and once he walked in, I presented Officer Palma the note and I asked him to read these notes or to translate these notes in Spanish to Dennis, and Detective Roberson and I both walked out of the room. We left the door partially open but we walked out of the room and took the position that Palma had originally which was by the door of the room.

* * *

[5266] A. Dennis told me that Douglas told him at the time, if he gets out, shoot him.

Q. And does Dennis describe whether or not that officer, in fact, gets out of the police car?

A. Yes, he does.

Q. What does he tell you but the officer and what takes place as he is getting out?

A. He told me that Officer Estefan or the officer got out of the car. The police officer had his gun drawn. The gun was pointed in his direction and that the man yelled to him or them to get out of the car.

Q. Were you able to physically pinpoint in terms of your questioning where the police car was, where the officer was in relation to the two vehicles?

A. Yes, I did.

Q. What information did you get from Dennis about where the officer was?

A. He told me that the policeman was in between the patrol car and in between the Mazda. He was between both vehicles.

Q. He didn't tell you something like the police officer walked all the way on the driver's side of the car or anything like that?

A. No, sir.

* * *

[5295]When arrest is made immediately, it's not a whodunit homicide, so the arrest is made on the scene or shortly after the incident occurred.

When an arrest is or when a homicide is a whodunit, all you have is a body and you don't know who did what or why. The investigation could be very prolonged. They could go for months and years.

Q. Isn't is true that most of the homicides, if they are going to be solved, get solved within a 24 to 48-hour period?

A. I would say 72-hour period is the preference as far as solving one, but again, we have homicides that get solved years, decades, after they occur.

Q. There are cases that at some point would be referred to another unit within the police department such as a cold case squad or a case where some work on the case hasn't been solved within a short period of time, isn't that correct?

A. When they work a case, it's usually years old, the cold case squad.

Q. Would I be fair in stating, Detective Morin, that around the 20th to 25th maybe 26 day, that you and your partner were feeling a lot of pressure not only from

inside the police department but pressure that you were putting on yourself of why an arrest had [5296] not taken place up until that point in time?

A. Yes. We were obviously feeling that the case was open. Being the investigator, you feel that and that is probably more from yourself, from an internal source than external sources. You feel that maybe perhaps if somebody else had investigated it, they might have cleared it by now, maybe I haven't done everything that's possible and there is pressure that you place on yourself when an arrest is not made especially on a case like this.

Q. From a personal point of view, a fellow police officer is gunned down, everybody is asking you questions about it, supervisor, friends, members of the public and you basically have nothing to tell them and you are beginning to feel a sense of personal pressure as, you know, we need a break in the case; isn't that correct?

A. You feel the pressure and I don't think we need a break in the case. You say, God, give me a break in the case.

Q. Either way, you are looking for something?

A. Yes, always looking.

Q. As a matter of fact, when the phone call came in from California, you would have some feeling of this might be a let down, that is your first response

* * *

[5313] and that he would speak to us.

Q. As opposed to what Dennis did in the case saying he didn't want to talk to you, Douglas said that he wanted to talk, correct?

A. That's correct.

Q. Isn't it true, detective, that one of the first thing that Douglas said to you after going through the initial comments of why you were there and the Miranda Rights

Waiver Form is that he made the statement, I am not a killer?

He wanted you to know that very directly, did he not?

A. Yes.

Q. After he made the statement to you that he was not a killer, he went on to tell you that he was only a car thief, isn't that correct?

A. Yes.

Q. He wanted you to know that he was, in fact, confessing to stealing a car to you?

A. Yes. Well, to stealing a car, to stealing cars.

Q. He wanted you to know quite openly, quite candidly that he was, in fact, a car thief?

A. Yes.

Q. Now, you know I am a little confused,

* * *

[5349] Q. He spoke Spanish?

A. Yes.

Q. Where is Palma?

A. Sitting outside in a chair.

Q. Did you ask Palma to come inside?

A. Not on this particular case.

Q. What did Dennis tell you?

A. Pardon me?

Q. What did he tell you, Dennis?

A. He told us that on the night of the officer's murder he was at home with his wife when his brother Douglas came in and said that he had just killed a policeman.

Q. And who besides you can testify that he said that?

A. Your client and I are the only ones that spoke Spanish. There was no—

Q. There was no one else to hear that in Spanish but you?

A. Correct.

Q. Because Barrazza wasn't there?

A. No, he was not.

Q. Finale wasn't there?

A. No, he was not.

Q. But Palma was right outside, correct?

[5350] A. Yes.

* * *

[5355] Q. Asked about his wife?

A. He did.

Q. He asked where was his wife at this particular time?

A. He did.

Q. Didn't you know where she was at the time?

A. Yes.

Q. Did you tell him where she was at the time?

A. I told him she was at the police station back in Miami.

Q. Did he ask about his kids?

A. On one occasion he did.

Q. Do you know where his kids were?

A. He didn't ask where they were. He asked what would happened if his wife was to get arrested in Miami.

Q. And what did you tell him?

A. We would either have to find family members to take care of the children or that the State of Florida has a division of Health and Rehabilitative Services that woul would take them.

Q. He was concerned about his wife and children?

A. Yes.

Q. Isn't it a fact that first time you went there you told him that his wife had been arrested [5356] was at the police station and the kids will be taken away?

A. That is untrue.

Q. Isn't it a fact, sir, that you kept pressuring him and pressuring him with the use of his kids and he still wouldn't tell you anything?

A. That is also not true.

Q. And each time you left, he would call you back and ask you about his kids, wasn't that right? Each time you came back, he asked about his wife and the kids?

A. He asked about his wife on more than one occasion. That is when he asked about what would happen if his wife was to be arrested in Miami.

Q. Now, all of this, all of this is coming from a man whose statement you said he made, who was suspected of killing someone and tells you that, correct me if I'm wrong, he finally says to you, I can't tell you anything in essence because I would be putting myself in the electric chair?

A. He does state that at one point.

Q. And then later on he says I am ready to commit suicide. I'll talk to you?

[5357] A. I believe the word he used was, I know I am killing myself, but I'll tell you what occurred.

Q. So now we go from a man who knows that his life might be on the line and suddenly he doesn't give a damn anymore, he is ready to die, isn't that what you're telling us? His mind changed that quickly from a man who won't tell you a thing, who knows the possibility of death, who tells you he knows the possibility of death and now he says to you, okay, I am ready to commit suicide and he gives you a statement, after saying I know I am killing myself, is that true?

A. That's right.

Q. But no nobody, nobody but you, h[illegible]rd that?

A. That's correct. Well, several people heard or Roberson and I heard it. Nobody else understood it I believe.

Q. Like if a tree falls in the forest, does it make a sound? Nobody else heard it, did they? They would be able to say they heard it, but you—

A. Again, and I guess it's just a word game—

Q. No, I don't play—

A. Roberson heard it. Whether he understood—

Q. Roberson couldn't say he heard it, could he, what he heard rather?

[5358] A. I guess we'll have to hear that from Roberson if it becomes important.

Q. It's up to you.

But we do know one thing, you are the only one there who understood it?

A. That's correct.

Q. You were the only person that can come in here and tell us he told you those things?

A. Yes.

Q. You said you went there ones with a tape recorder, is that right?

A. Yes, we did.

Q. Did he give you a tape recorded statement?

A. No, he did not.

Q. So you were frustrated in an effort to get a tape recorded—

A. I wasn't frustrated into my effort getting the statement or not. Getting the statement was, again, Dennis' right and he opted not to.

Q. Had he given you a tape recorded statement, you could then say yes, he told me this and here is the cotton-picking voice telling me that?

A. The tape speaks for itself.

Q. You didn't have that, did you?

A. Pardon?

[5359] Q. You didn't have that?

A. No, sir.

Q. All we have, again, is your word?

A. Yes, sir.

Q. Is that correct?

A. That's correct.

Q. When you want to talk to Douglas now, Douglas had no reason to want to tell you anything because you told Douglas from the beginning I know you didn't do this, right, that is part of your come on?

A. Well, I didn't tell him I know you didn't do this. What I told Douglas was, I know that you didn't fire a shot.

Q. But you did not know that, did you?

A. I had some idea how it occurred.

Q. But you did not know that, did you? Yes or no?

A. Well, I can't answer it. It boils to the credibility issue of who I heard it from.

Q. Sir, even today, you don't know that?

A. Yes, I do.

Q. If you did, we wouldn't be here?

A. We would always be here.

MR. LAESER: This is being argumentative.

THE COURT: Sustained.

[5360] MR. CARTER: Withdraw that.

BY MR. CARTER:

Q. Next question. Douglas wanted a little money?

A. Yes, he did.

Q. He wanted a lot of money, $80,000 he wanted?

A. He wanted it.

Q. Didn't ask you about the reward once or twice, did he?

A. On several occasions.

Q. And he wanted to know if I tell you this, you can't give me the money, because you told him that, right—

A. That's right.

Q. —could you give it to my wife and kids?

A. Yes, he did say that.

Q. At that point $80,000—he told you what you wanted to know?

A. Yes.

Q. So long as it doesn't implicate that he is the person that did the shooting?

A. No information ever came about that he was the person that did the shooting.

Q. Now, Douglas cried at one point, didn't he, got remorseful and cried?

[5361] A. His eyes watered.

Q. And the same man who walks, putting guns in people's stomach cried, didn't he?

A. Yes.

Q. The same man who is known as the Bandit of Camino Real cried? Yes?

A. Yes.

Q. The "I will kill the cop before I go back to prison" —

A. Cried.

Q. A regular little pussycat at that point, wasn't he?

A. Yes.

Q. He was either telling you, I am sorry, I'll tell you about my brother, right—he even tells you something then?

A. Yes.

Q. This tough "hombre" is now Douglas, the pussycat, and you believed him, didn't you?

A. Yes, I did.

Q. You were taken in by him as everybody else was?

A. No, sir. One second, sir. I'd like to explain that, sir.

THE COURT: Go ahead.

[5362] THE WITNESS: Everything that Douglas Escobar told me or most of what Douglas Escobar told me has been verified either through other sources or through physical evidence one way or another.

MR. CARTER: You are making assumptions and drawing conclusions. You weren't asked for that.

I ask that be stricken and he is drawing a conclusion.

THE COURT: I am not going to strike it. Go on to the next question.

MR. CARTER: Thank you very much.

BY MR. CARTER:

Q. And when he cried, he told you about what he did supposedly and what his brother did, right?

A. Yes, he did.

Q. Did he ever tell you that that big gun belonged to him?

A. No, he did not.

Q. Did he ever tell you that the police officer ordered the driver out of the car?

A. No, he did not.

Q. Did he tell you that he was the driver of the car?

A. Yes, he did.

Q. Did he tell you whether the police officer [5363] approached from the passenger side or the driver's side?

A. From the passenger side.

Q. Now how long have you known Officer Estefan?

A. 13, 14 years.

Q. And he was a traffic police officer, correct?

A. Yes, he was.

Q. And he approached this car from the rear, is that what he told you?

A. He approached it from the passenger side.

Q. Did he come from the rear of the car? Did Douglas tell you that?

A. I don't remember Douglas telling me that.

Q. Did he pull the car up into a driveway?

A. Are you referring to Victor or Douglas?

Q. Did Douglas tell you he pulled the Mazda into a driveway?

A. Into the front yard of the house.

Q. He didn't back in there, he pulled in there, right?

A. Correct.

Q. And then he told you that the policeman ordered the passenger out of the car, right?

A. Yes.

Q. And this policeman of 17 years approached [5364] this car from the passenger side, right?

A. Yes.

Q. Because he wanted to give the passenger a ticket because this was a foreign car with a steering wheel on the right-hand side?

A. No, because the passenger was his closest threat.

Q. Threat?

A. Yes.

Q. Is the steering wheel on the right-hand side?

A. We are talking—

Q. The Mazda.

A. No, obviously.

Q. It's on the left?

A. Yes.

Q. That is where the driver was, right?

A. Yes.

Q. But you tell us that Douglas told you he approached the passenger and told the passenger to get out of the car?

A. That's correct.

Q. Did Douglas tell you at that point he squatted or squatted down in the seat?

A. No, he did not.

Q. Did Douglas tell you that the gun was on the [5365] passenger side of the—

A. Are you referring to before or after the incident?

Q. At the time the incident happened.

A. He didn't tell me where the gun was.

Q. He told you that he was wanted in California, didn't he?

A. Yes, he did.

Q. And he told you that he didn't want to go back to prison, didn't he?

A. He did.

Q. And he told you that he knew that if a police officer stopped him, he would have to go to prison, right?

A. Yes.

Q. That is the same man who had already threatened to kill a police officer before he went to prison, right, the same man?

A. Yes.

Q. Did he tell you that Dennis wasn't wanted by anyone?

A. He did not tell me that.

Q. Did he tell you that Dennis hadn't gone around threatening anyone?

A. He did not tell me.

[5366] Q. Did he tell you that Dennis wasn't running from the authorities?

A. He didn't tell me that either.

Q. Did he tell you that Dennis was known as the Bandit of Camino Real?

A. No.

Q. Did he tell you that Dennis put a gun on Ramon Arguello's face, chest rather?

A. No.

Q. But he told you that Dennis shot the police officer because he told him to?

A. Because he told him to and because he did not want his brother to go back to prison.

Q. That's what Douglas told you, right?

A. Yes, that's correct.

Q. Because Douglas wouldn't shoot a police officer because he is the one that is going to go back to prison but he wouldn't shoot?

Did he tell you that?

A. I'm sorry. I missed your question.

Q. I said Douglas told you he wouldn't shoot a police officer because he doesn't want to go back to prison, if he shoots a police officer, he might go back to prison?

A. He didn't say that.

[5367] Q. He didnt?

A. No.

Q. I don't believe he did. When you were talking to Douglas, he was very, very coherent, wasn't he?

A. Yes, he was.

Q. And he was laying up there with a tube in almost everything he had?

THE COURT: I think it's over there (indicating).

BY MR. CARTER:

Q. Was he looking like he looked in State's Exhibit Number 53 when you saw him that day?

A. Yes.

Q. He was lying there telling you all these things?

A. Yes.

Q. And he cried and he told you?

A. Yes.

Q. And he asked you once about the $80,000, he asked a second time about the $80,000, he asked you a third time about the $80,000, but this man here was the one that he claimed wanted to commit suicide by telling you that he shot the police officer?

A. He claimed that he knew he was killing [5368] himself, but that he would tell us about what happened with Officer Estefan.

Q. After four times of telling you, I'm not involved in this, he suddenly decides to commit–

MR. LAESER: Repetitious.

THE COURT: Let's move on, please.

BY MR. CARTER:

Q. Am I correct?

A. Yes.

Q. And the only person in the face of this earth who is testifying here now of that particular "fact", would be you?

A. That's correct.

Q. But you had available to you the opportunity to have someone witness the statement, witness signing of the rights?

MR. LAESER: Objection, your Honor. It's a question that has been asked, repetitious.

THE COURT: Sustained.

BY MR. CARTER:

Q. And you employed no one–

MR. LAESER: Objection, your Honor.

THE COURT: Sustained.

BY MR. CARTER:

Q. Now, Douglas blamed Dennis for the shooting [5369] right?

A. For his part in the shooting, yes, he did.

Q. And Douglas blamed the justice system for any predicament he was in, right?

A. Yes.

Q. Did he blame anybody else for anything? Did he blame the nurses for mistreating him?

A. No.

Q. Did he do that?

A. No.

Q. Did he blame the doctors for not taking care of him properly?

A. No, he did not.

Q. Did he blame the authorities for not bringing him any magazines like you did?

A. No.

Q. But he found fault, wouldn't accept the fact that he, himself, may be at fault, not the system: but he blamed the system and he blamed others, Dennis rather?

A. Yes.

Q. I am concerned about what he told you. Did he tell you that Dennis got out of the car to shoot the police officer?

A. Yes, he did.

[5370] 1 Q. So according to him, the police officer came up and Dennis got out of the car, correct?

A. Yes.

Q. Did he tell you whether or not Dennis fired from the window or was he outside when he fired the shot?

A. He told me Dennis was out of the car.

Q. Did he tell you how many shots Dennis fired?

A. Three or four.

Q. Did he tell you in which direction he fired those shots?

A. No.

Q. Did he tell you whether he was standing up over the police officer?

A. No.

Q. Did he tell you whether or not the police officer was coming towards him at the time or had turned to walk away?

A. He described it to me as the police officer having

his gun drawn on the passenger of the car and that leads me to believe that the police officer was facing him.

Q. Drawn on the passenger?

A. Correct.

Q. Facing the passenger?

[5371] A. Correct.

Q. But he didn't say that leaks you to believe that?

A. That leads me to believe that.

Q. But he never told you that?

A. No, no, sir.

Q. Approaching the passenger—

A. I'm sorry.

Q. He is approaching the passenger side of the car with his gun drawn is what he told you?

A. That's correct.

Q. On which side was Victor wounded?

A. On his left side.

Q. Left side, and he approached the car on the passenger side with his gun drawn.

Is Victor left-hand handed or right-handed, do you know?

A. I don't know.

Q. Did he tell you whether or not the police officer was facing Douglas when he was shot—I mean—Dennis when he was shot and had to turn to walk away?

A. He didn't.

Q. But you are absolutely certain the police officer didn't approach on the driver's side, correct?

A. Correct.

[5372] Q. He didn't tell you that the police officer having noticed someone squatting down turned to go back to his car?

He didn't tell you that, did he?

A. Those facts never came up, no.

Q. He didn't tell you that when he turned to go to his car, that's when the police officer was shot in the left side, correct?

A. No, that never—

Q. Or did he tell you as he approached the driver's side of the car, he shot him in the stomach and that spun him around?

A. No, he did not.

Q. The other shot came to the left arm?

A. No, he did not say anything like that.

Q. Or did he tell you that the sunroof was open and he stood up and he fired down into the left of the officer?

Did he tell you that?

A. No, sir.

Q. How much time did you spend with him overall?

A. Oh, well in excess of an hour and a half.

Q. But what he told you, and I want to make sure about this, is that the police officer approached from the passenger side, right?

[5373] A. Yes.

Q. Or ordered the passenger out of the car?

A. Yes.

Q. The passenger got out and shot the police officer. That's what he told you, right?

A. Yes.

Q. But he didn't tell you whether the police officer was coming towards the passenger or going away, correct?

A. Correct.

Q. And either way he came, whether he was going towards the driver or going towards the passenger or going away from the passenger, the shots in the body of Victor Esteban are at the same location that they were found, correct?

MR. LAESER: Objection, your Honor, to the form of the question.

I think it's outside the witness'–

MR. CARTER: If you know.

THE COURT: I think it's beyond.

BY MR. CARTER:

Q. Did he tell you that?

THE COURT: You can answer it.

THE WITNESS: No, he did not tell me that.

[5374] BY MR. CARTER:

Q. Did he tell you that it would be almost impossible for the passenger to have fired the shots from the position the passenger was in?

MR. LAESER: Objection, argument.

THE COURT: Yes, he testified on his direct. Go to another area, please.

BY MR. CARTER:

Q. You told us, sir, that Dennis told you that if it came down to having to come to court, he'd denied he ever told you that statement, right?

A. Yes.

Q. You knew that possibility existed when you first went to talk to him, didn't you?

A. Certainly.

Q. And you took no precautions?

A. I took my tape recorder, but came back empty-handed.

Q. You didn't ask Palma to come inside?

MR. LAESER: Objection for the sixth time.

THE COURT: Let's not do that again.

BY MR. CARTER:

Q. The only precaution you had was yourself?

A. The only precaution I had was a tape recorder which, again, I came back empty, and as far as Dennis'

[5375] conversation with me, it's obvious at this point that Dennis and I were the only persons in that room that spoke Spanish.

Q. Did Dennis tell you that Douglas shot the police officer?

A. He never said that.

Q. Think a moment.

A. I'm sorry. He told me that as one of the stories.

Q. My question is, did he ever tell you that Douglas shot the police officer? That is all it was.

A. Yes, on the second interview he did.

Q. Did you ever tell Dennis his wife was in custody?

MR. LAESER: I am sorry. I didn't hear.

THE COURT: Did he ever tell Dennis that his wife was in custody?

MR. CARTER: Withdraw.

BY MR. CARTER:

Q. Did you ever testify, tell anyone before, that you told Dennis his wife was in custody?

A. I don't recall testifying that way.

Q. Do you recall testifying in California?

A. I do.

MR. LAESER: Which statement?

[5376] MR. CARTER: I am talking about the trial testimony.

(Thereupon, a brief discussion was held off the record, after which the following proceedings were held:)

MR. CARTER: I'll try and refresh your recollection.

MR. LAESER: Page and line, please.

MR. CARTER: 367, line 17, sir.

THE WITNESS: Go ahead.

BY MR. CARTER:

Q. Did you testify that you told him his wife was in custody?

A. Again, I repeat I don't recall ever testifying that his wife was in custody, and it's not so stated on line 17.

Q. My question was, did you ever testify in a court of law that you told him his wife was in custody?

MR. LAESER: Most respectfully, this question is a question of bad faith. It's not in here.

THE COURT: Let me see what you have there, detective.

THE WITNESS: Line 17, your Honor.

MR. CARTER: Page 367, line 17.

[5377] THE COURT: Did you ever tell him that?

THE WITNESS: No, I did not tell them that.

BY MR. CARTER:

Q. Will you read line 17 see if that refreshes your recollection, that answer?

A. You are referring to page 367 California testimony line 17 and I'll read if you want.

Q. Go right ahead.

MR. LAESER: Please read the whole thing.

THE WITNESS: The question from the defense counsel at that point was, who was Mr. Frank Banqunhan (phonetic) the gentleman in California and isn't it true that you told him that his wife was a suspect in the investigation because of her involvement?

BY MR. CARTER:

Q. And your answer?

A. My answer is, "What I told him," and there is a pause, "he asked if his wife was in custody. I told him that his wife was at the present time."

Q. Keep reading.

A. "I told him that his wife was at the present time." That was a true statement.

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